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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of Ohio

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

In accordance with Rule 13(2) of the Rules of the Supreme Court of the United States, appellants Arrow Transportation Company, American Commercial Lines, Inc., Blaske, Inc., Coyle Lines Incorporated, Dixie Carriers, Inc., Federal Barge Lines, Inc., Gulf-Canal Lines, Inc., Igert, A. L. Mechling Barge Lines, Inc., Mississippi Valley Barge Line Company, The Ohio River Company, Sioux City and New Orleans Barge Lines, Inc., Union Barge Line Corporation,

Waterways Freight Bureau, The American Waterways Operators, Inc., Tennessee Valley Authority,* Central Soya Company, Inc., Morris Grain Corporation, Cargill, Incorporated, Archer-Daniels-Midland Company, City of Guntersville, Alabama, Guntersville Chamber of Commerce, O. J. Walls, d/b/a O. J. Walls Company, John D. Bagwell Farms and Hatchery, Inc., Southeastern Association of Local Grain Producers, Processors, Merchandizers and Consumers, Tennessee River and Tributaries Association, and the State Corporation Commission of the State of Kansas, submit herewith their statement as to jurisdiction:

OPINIONS BELOW

The opinion of the District Court which was filed on May 20, 1964, is reported at 229 F. Supp. 572 and is set forth as Appendix A hereto. The opinion of the Interstate Commerce Commission, decided on July 1, 1963, is printed at 321 I.C.C. 582 and is reproduced as Appendix C to this Statement. The order of the Commission, entered July 1, 1963, is reproduced as Appendix D hereto. The opinion of Division 2 of the Commission, decided on January 21, 1963, is printed at 318 I.C.C. 641 and is reproduced as Appendix E to this Statement. The order of Division 2 of the Commission, entered January 21, 1963, is reproduced as Appendix F hereto.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321-2325, 5 U.S.C. 1009, and 49 U.S.C. 17(9) by The Cincinnati, New Orleans & Texas Pacific Railway Company and certain other railroads which

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* See Appendix H re authorization of TVA to take this appeal.

together comprise the Southern Railway System (herein called "Southern") to set aside an order of the Interstate Commerce Commission. The final judgment of the three-judge District Court (Appendix B hereto) was entered on June 4, 1964, and appellants herein filed their notices of appeal in the District Court on July 31 and August 3, 1964.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following cases sustain the jurisdiction of the Supreme Court to review this case on direct appeal: *Interstate Commerce Comm'n* v. *Mechling*, 330 U.S. 567; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding sections 1, 301, 901, and 1001) and sections 1(5) 3(1), 15(7), and 15a(3) of the Interstate Commerce Act (49 U.S.C. 1(5), 3(1), 15(7), and 15a(3), respectively) are set forth in Appendix G to this Statement.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

I

With reference to the Commission's finding of a violation of section 3(1) of the Act:

Where grain merchants at ports on the Tennessee River are in competition with merchants located at the Ohio and Mississippi River crossings in the handling of grain which moves from north and west of such crossings to markets in the Southeast which are more than 346 miles beyond, but which are less than 346

miles beyond the Tennessee River ports; where the rates in issue are based primarily on mileage but include a minimum rate applicable to all movements up to 346 miles; and where the Interstate Commerce Commission has made findings which were accepted by the District Court that such minimum discriminates against and causes injury to the merchants at the Tennessee River ports; did the District Court misinterpret and misapply section 3(1) of the Act and the National Transportation Policy and erroneously substitute its judgment for that of the Commission in setting aside the Commission's ultimate finding of unlawful preference and prejudice and its subsidiary finding that there is no substantial dissimilarity in transportation conditions as between the points preferred and those prejudiced?

II

With reference to the Commission's finding of a violation of section 1(5) of the Act:

(1) Did the District Court improperly substitute its judgment for that of the Commission in setting aside the Commission's findings that there was no reliable evidence of record to support Southern's claims that it would achieve a car utilization of 40,000 miles per year under the proposed rates and that approval of the reduced rates of other railroads serving the Southeast would tend to reduce the Southern's car utilization?

(2) Was the District Court in error in holding that the finding by the Commission that the Southern's costing procedures duplicated the exclusion of "non-applicable" items of maintenance was insufficient because not supported by subsidiary findings?

(3) Did the Commission make all the findings necessary to support its decision and were such findings supported by substantial evidence in the record?

(4) Did the District Court err in permanently enjoining the order of the Commission?

III

Did the District Court properly construe the decision of the Commission as requiring that the rates be increased to avoid unfair or destructive competition and, if so, did the District Court err in concluding that the Commission's order was in violation of section 15a(3) of the Act, was beyond the Commission's statutory authority, and was not supported by substantial evidence?

STATEMENT

The issue in this case is whether the southeastern railroads may maintain a system of grain rates which is "loaded" against rail movements out of the Tennessee River ports and will divert to an all-rail movement grain from the Midwest which would otherwise move into the consuming areas of the Southeast by barge to the Tennessee River ports and by rail beyond. This controversy has a long history. Other facets of it have been before this Court in *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala.), *aff'd per curiam sub nom. State Corp. Comm'n of Kansas* v. *Arrow Transp. Co.*, 361 U.S. 353, and *Arrow Transp. Co.* v. *Southern Ry. Co.*, 372 U.S. 658.

Prior to the development of the Tennessee River waterway there was little movement of grain from the Midwest to the South because rail rates were prohibitive. With the development of the Tennessee River it became possible to ship grain by barge from Midwest-

ern ports such as Evansville and St. Louis to the Tennessee River ports such as Chattanooga and Guntersville. As a result northern Georgia and Alabama became the largest poultry producing area in the country. Grain elevators and other facilities have multiplied at Chattanooga and Guntersville, supplying these markets with grain shipped in from the Midwest over the Tennessee River and transshipped by rail or truck to the consuming areas.

The railroads first sought to impede this movement by maintaining high local rates on ex-barge traffic while handling ex-rail traffic on a much lower divisional basis. In *Arrow Transp. Co.* v. *United States, supra,* this system of rates was held unlawful, and relief was ultimately granted by the Commission in *American Barge Line Co.* v. *Alabama Great Southern R.R.,* 316 I.C.C. 759. This relief was originally to be effective on July 2, 1959, but due to postponements requested by the railroads it did not become effective until October 21, 1961, in the case of wheat and flour and June 25, 1963, in the case of coarse grains.

In July, 1961, Southern filed the rates here in issue. These rates are based on a formula of .573 cents per ton-mile plus a terminal factor of 42 cents, with a $2.40 minimum applicable for all distances up to 346 miles. They apply to minimum shipments of 450 tons in five 90-ton aluminum hopper cars, and some services furnished under the existing rates are not included. All of the other railroads serving the Southeast promptly published rates which are identical except that they are applicable to shipments in nine ordinary 50-ton boxcars.

These rates posed a dual threat to the barge-rail movement and to the industry which has developed at

the Tennessee River ports to serve that movement. The competitive position in the major Southeastern grain markets of the all-rail movement and of grain merchandisers at Ohio and Mississsippi River cities using that movement was vastly improved by reductions in the all-rail rate averaging 60 percent, but this is only part of the story. The major grain markets in the Southeast are south and east of the Tennessee River ports and less than 346 miles from them. The device of a $2.40 minimum for distances up to 346 miles denied to the barge-rail movement and grain merchandisers at the Tennessee River ports the benefit of the lower rail rates on the rail leg of that movement.

Nor was the threat posed by these rates limited to the barge-rail grain movement and to industries dependent on it. The two common carrier barge lines operating on the Tennessee River derive 80 and 51 percent, respectively, of their total revenue from carriage of grain. A loss of their grain traffic could make it impracticable for them to operate at all, threatening the Tennessee River with a loss of common carrier barge service altogether. Such a result would adversely affect other industries along the river which now depend on such service, and would be a heavy blow to the economic future of the Tennessee River port cities and of the entire Tennessee Valley region.

In addition, the rates posed a threat to other grain interests, including Midwestern processors, who would be compelled to pay the existing rates on products of grain which they shipped to the Southeast in competition with shippers who could use the reduced whole grain rates.

Upon protest by numerous parties the Commission suspended the rates both of the Southern and of the

other railroads and instituted an investigation into their lawfulness. The record of that investigation ran to 15,815 pages of testimony and 766 exhibits.

On January 21, 1963, Division 2 of the Commission held Southern's rates lawful but found that the rates of the other railroads were far below their out-of-pocket cost and therefore unreasonably low in violation of section 1(5) and ordered them cancelled. Under the rules of the Commission, the matter having been determined to involve an issue of general transportation importance, the Division's decision was subject to review. Accordingly, that order did not become effective. Nevertheless, all of the rates went into effect on May 11, 1963, following the decision of this Court in *Arrow Transp. Co.*, v. *Southern Railway Co., supra,* that the courts are without power to prevent such effectiveness at the end of the statutory suspension period even to prevent established irreparable injury.

The decision of the Commission invalidating all of the proposed rates was handed down on July 15, 1963. The Commission ordered all of the rates cancelled, without prejudice to the publication of rates for all of the railroads at a somewhat higher level (an average of 53% below existing rates, as compared to the average 60% reduction proposed), and of rates from the Tennessee River ports no less favorable than the rates available from the Ohio and Mississippi River crossings. The Temporary Restraining Order issued by the District Court below prevented the order of the Commission from taking effect, and the rates of all of the railroads have continued and now continue in effect.

On June 4, 1964, the District Court entered the judgment from which this appeal is taken.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this case are basic to the administration of the Interstate Commerce Act and the National Transportation Policy.

Undue Prejudice in Violation of Section 3(1) and the National Transportation Policy

Grain shipped into the Southeast has its origin at country points throughout the areas north and west of the Ohio and Mississippi Rivers. There are three competing types of grain movements from these origins to the Southeast: (1) by various modes to the Mississippi and Ohio River crossings and by rail to destination; (2) by barge to the Tennessee River ports and by rail or truck to destination; and (3) by truck from origin to destination. The section 3(1) issue involves competition between the merchants at the Ohio and Mississippi River crossings and those at the Tennessee River ports.

The reduced rates here involved are constructed by the use of a mileage factor and a terminal factor, but there is a minimum charge of $2.40 for all distances up to 346 miles. The $2.40 minimum does not affect Ohio or Mississippi River merchants because their major southeastern markets are more than 346 miles from their places of business, but it is seriously prejudicial to Tennessee River shippers because most of their major markets are less than 346 miles from the Tennessee River ports. From St. Louis to Birmingham, for example, the rate of $3.12 per ton for 472 miles produces a charge of 6.6 mills per mile. From Guntersville to Birmingham, the minimum rate of $2.40 for 71 miles produces a charge of 33.8 mills per mile, more than five times as great.

The Commission found that the $2.40 minimum rate produced undue preference and prejudice in violation of section 3(1). Such a finding of undue preference and prejudice rests on three essential elements: A difference in transportation charges, injury resulting from such difference, and insufficient dissimilarity in transportation conditions to justify the difference in treatment. The Commission found the existence of each of these elements.

On the difference in charges, it found:

> Thus, the minimum would not apply to shipments of grain from the Mississippi and Ohio River crossings to the major markets in the Southeast served by the Tennessee River ports, since those markets are more than 346 miles from the river crossings. On the other hand, the 240-cent minimum under the proposed rates, as promised to be established from the Tennessee River ports, would be the applicable rate to most of the important markets served by those ports. (321 I.C.C. at 608, App. C, *infra*, p. 41a)

It went on to find:

> The practical effect of applying the proposed rate formula with its 240-cent minimum to the Tennessee River ports would be to build a Chinese Wall along the south bank of the Tennessee River through which no ex-barge grain could penetrate by rail. (321 I.C.C. at 608, App. C, *infra*, p. 41a)

On the question of injury, the Commission found:

> A number of protestants have shown that such [positive] injury reasonably may be expected to result from approval of the proposed rates. (321 I.C.C. 608, App. C, *infra*, p. 41a)

The foregoing findings were accepted by the District Court, so the only question remaining under sec-

tion 3(1) is whether there were adequate findings supported by substantial evidence on the question of similarity of transportation conditions. On this issue the Court held that the Commission's finding was inadequate, not supported by substantial evidence, and an abuse of discretion. The Commission's finding on this issue was that:

> No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice. *Mississippi Cotton Seed Crushers Assn.* v. *A., B. & C. R. Co.*, 238 I.C.C. 87, affirmed, 254 I.C.C. 643 (1942). (321 I.C.C. at 610, App. C, *infra*, p. 43a)

This finding is adequate and supported by substantial evidence. It comments on the "severe" nature and extent of the truck competition "at" the Tennessee River ports and "at" the Mississippi and Ohio River crossings. It embraces the undisputed evidence that since the backhaul Midwest truck competition, which Southern claims its rates are designed to meet, originates at country elevators in areas north and west of the Mississippi and Ohio River crossings, it passes through or around the Tennessee River ports in the same manner as it passes through or around those river crossings and is "severe" competition to the railroads at the former as well as at the latter. No less clearly, this finding also embraces the further undisputed fact that substantial truck competition, which developed

in the absence of reasonably related railroad rates, originates at the Tennesssee River ports in connection with moving ex-barge grain to interior points in the Southeast.

The Court's conclusion that "The Commission's purported finding on this essential element is inadequate" is inexplicable. Its conclusion that the findings are not supported by substantial evidence is based on a misunderstanding of both the law and the facts. As to the law, it proceeded on the apparent assumption (see its Conclusion of Law No. 3) that any lack of similarity in transportation conditions between preferred and prejudiced points would invalidate a section 3(1) order requiring removal of the preference and prejudice. This assumption was in error. The question is not whether there is similarity of transportation conditions in all respects. It is whether there is such dissimilarity as to convince the Commission, in the exercise of its informed judgment and after weighing all the circumstances, that the proposed difference in rates is warranted. *L. T. Barringer & Co.* v. *United States* 319 U.S. 1, 6-7; *United States* v. *Wabash R.R.*, 321 U.S. 403, 410-11; *New York* v. *United States*, 331 U.S. 284, 347.

As to the facts, the District Court said:

> The purpose of the multiple car rates was to make the railroads competitive with the dominant long-distance backhaul truck movement of grain from the Middle West to the Southeast. There is no showing that similar long haul truck movements exist in relation to the Tennessee River ports. (229 F. Supp. at 578-79, App. A, *infra*, p. 10a)

As noted above, the record discloses no truck movement *originating at* the Ohio and Mississippi River

crossings. It does disclose that the truck competition of grain merchants located both at the Ohio and Mississippi River crossings and at the Tennessee River ports is that of itinerant truckers who originate grain at points north and west of those crossings and haul this grain through or around both those crossings and the Tennessee River ports. When an itinerant trucker picks up grain at an elevator in Indiana and delivers it to a feed mill in Birmingham, Alabama, he displaces the movement of grain by barge to a Tennessee River port and by rail from such port to Birmingham, as well as the movement to an Ohio or Mississippi River port and by rail beyond. The long-haul trucker provides the same competition in relation to the Tennessee River ports as in relation to the Ohio and Mississippi River crossings.

The Commission also correctly noted that its finding of undue prejudice in violation of section 3(1) accorded with the requirements of the National Transportation Policy as heretofore interpreted by this Court. Because of the application of the minimum rate provisions, the relative level of rates from the Tennessee River ports, as illustrated by the above-cited example involving rates to Birmingham, is very much higher than from the Ohio and Mississippi River crossings. This is precisely the type of discrimination which this Court has condemned in *Interstate Commerce Comm'n* v. *Mechling*, 330 U.S. 567; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *Interstate Commerce Comm'n* v. *James McWilliams Blue Line, Inc.*, 342 U.S. 951, *affirming James McWilliams Blue Line, Inc.* v. *United States*, 100 F. Supp. 66 (S. D. N.Y.); *State Corp. Comm'n of Kansas* v. *Arrow Transp. Co.*, 361 U.S. 353, *affirming Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala.).

It is immaterial that the $2.40 minimum is in theory applicable from the Ohio and Mississippi River crossings as well as from the Tennessee River ports, since the minimum has no practical application from the former but effectively prevents movements from the latter. As this Court said in *Dixie Carriers:*

> Section 3 outlaws discrimination in all of its forms. (351 U.S. at 60)

There is no evidence in the record that the difference in the level of rates is justified by any difference in costs. The only evidence in the record is general opinion testimony that costs would be somewhat higher from the Tennessee River ports because the shorter movement would result in lower car utilization. This is a far cry from showing that the difference in rates is justified by a difference in costs; obviously rates which are the same for 10 miles and for 346 miles cannot reflect the same costs for both movements.

The Commission took note of Southern's assertion, accepted it as a correct generalization, but explicitly held that it was not adequate justification for the patent discrimination, saying:

> We agree with the Southern that the "Big John" car utilization would be reduced to the extent that such cars were used to haul grain from the Tennessee River ports. We do not agree, however, that a virtual embargo may be imposed on traffic moving from the Tennessee River ports to major markets in order to justify costwise the rates established from the Mississippi and Ohio River crossings. The fact that an increase in rates from the preferred origins may be required to eliminate undue prejudice is obviously not a defense against the removal of prejudice and preference. (321 I.C.C. at 609, App. C, *infra,* p. 42a)

Southern's assertion is the same kind of generalization which the Court rejected in *Interstate Commerce Comm'n* v. *Mechling*, *supra*, pointing out that:

> To justify increasing the reshipping rates of ex-barge grain the Commission would have to make findings supported by evidence to show how much greater is the cost to the eastern roads of reshipping ex-barge grain than of ex-lake or ex-rail grain moving from the same localities and requiring the same service as does the ex-barge grain. (330 U.S. at 583)

It may be suggested that the provisions of the National Transportation Policy do not come into play because of the Commission's finding that the all-rail movement has the inherent cost advantage over the barge-rail movement. This finding related only to the question of whether the reduction in the level of the all-rail rates constituted an unfair and destructive competitive practice, and presents a wholly different question.* Assuming authorization to the railroads to reduce their grain rates close to the out-of-pocket level in competition with barge-rail movements, such authorization does not confer a right to compound the injury to the water movement by instituting discriminatorily high rail rates on ex-barge grain. Section 15a(3) of the Interstate Commerce Act did not repeal section 3(1).

Unreasonableness in Violation of Section 1(5)

The Commission found that the proposed reduction of 60 percent in the pre-existing level of railroad rates would make them inadequately compensatory and unreasonable in violation of section 1(5) of the Inter-

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* See *infra*, pp. 21-24.

state Commerce Act. Atlhough this finding disposed of the issues before it, the Commission went on to indicate that it would approve a reduction of 53 percent. The Commission reversed an earlier ruling of its Division 2 that as to the Southern—but not the other railroads—the proposed 60 percent reduction would return 113 percent of out-of-pocket costs, and that this level would be reasonably compensatory. The Commission accepted 118 percent of out-of-pocket costs as representing an appropriate test of minimum reasonable rates, but found that rates reduced by 60 percent would return only 102 percent of Southern's out-of-pocket costs and would be too low.

The District Court set aside the Commission's finding on the ground that it was "based on the invalid premise that section 3(1) of the Act has been violated and on findings as to car utilization and costing procedures which were not supported by substantial evidence in the record." The difference between the District Court and the Commission centered on Southern's car costs, with particular reference to the average number of miles per year that the Southern's jumbo aluminum hopper cars can be expected to be utilized.

Southern presented a car utilization estimate of 40,000 miles per year. The Commission rejected it for four separate reasons. The District Court re-evaluated the evidence and made independent findings on each of these four points:

First, the Commission found that there was no reliable evidence to support Southern's 40,000-mile estimate.

The District Court found dispositive support for the 40,000-mile figure in an exhibit filed by Southern which

proposed to show, on the basis of a test period, that Southern's preliminary experience with its jumbo aluminum hoppers had resulted in a utilization figure of 60,212 miles under certain section 22 rates for the Government, and 39,079 miles for certain single car shipments. These figures were for government movements in a limited area, and did not purport to reflect commercial movements of the character or scope to be anticipated under the proposed rates. The District Court also ignored the fact that these figures offered by Southern had been completely exploded before the Commission. They were based on extrapolation of two months' experience which did not include any time of car detention at origin, which Southern "assumed" to be the same as detention time at destination. In fact, analysis of the actual experience showed that detention time at origin was about ten times as great as at destination. The evaluation of such data and the circumstances to which it relates is precisely the function of the Commission, not of the District Court.

Second, Division 2 had approved the rate reductions proposed by the Southern, while at the same time rejecting the similar reductions proposed for the other railroads, whose costs it found to be higher. The Commission held that the reductions which it approved should be permitted over the lines of all the railroads involved, and found that the resulting competition for Southern would reduce its car utilization below that estimated by the Division.

The District Court found that the Commission was wrong and that approval of reduced rates for the other railroads would not reduce the 40,000 car-mile utilization figure because Southern computed its proposed rates on the assumption that it would obtain 16

percent of the traffic and that the other railroads would obtain reduced rates. In so doing, the District Court overlooked the fact that it was Division 2's estimate on which the Commission was passing, not Southern's computations and assumptions. Division 2, though explicitly recognizing, as did the Commission, that the evidence concerning car utilization was dubious—had used a 40,000 mile estimate—while denying reductions to the other railroads. Obviously, if the 40,000 car-mile figure was proper, assuming no rate reductions for the other lines, it could not be proper if they were granted reductions equal to those approved for Southern.

Third, the Commission found that correction of the section 3(1) violation at the Tennessee River ports would result in increased use of Southern's jumbo aluminum hopper cars for shorter hauls, thereby reducing their total mileage utilization.

The District Court found that no reduction in car utilization resulting from elimination of the $2.40 minimum should be assumed because the $2,40 minimum did not violate section 3(1) and should not be eliminated. This was clearly erroneous for the reasons outlined above.*

Fourth, the Commission found that Southern misapplied the car utilization factor by duplicating its exclusion of "non-applicable" items of maintenance.

The Court said that the Commission had made no findings to support this "conclusion". In fact, the Commission stated expressly:

> . . . it is believed that the prior report, in using the 40,000 car-mile figure, failed to give sufficient

* *Supra*, pp. 9-15.

> consideration to the fact that so-called nonapplicable items of maintenance expenses have already been excluded in developing the associated car maintenance expense. As pointed out by protestants, this has the effect, when considering the common elements of maintenance expenses, of saying that the jumbo cars will cost only 40 percent as much per car-mile to maintain. (321 I.C.C. at 615-16, App. C, *infra*, pp. 48a-49a)

In its treatment of these four points, the District Court seemed to overlook entirely the requirement of section 15(7) of the Act that carriers proposing changes in rates have the burden of proving that the changes are reasonable. The Court was willing to accept any scintilla of evidence as a sufficient basis for substituting its judgment for the Commission's judgment that Southern's contentions had not been substantiated. In so doing, the Court ignored the admonition of this Court in *New York* v. *United States*, 331 U.S. 284:

> The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal. (331 U.S. at 328)

The extent to which the District Court ignored the burden of proof is emphasized by its statement that the Commission's own use of a car-utilization figure of 20,852 miles, representing Southern's actual experience with all of its covered hopper cars, was improper because of differences between them and the new aluminum hoppers. But this was, as the Commission indicated, the only car utilization figure which had any

valid support in the record. Since Southern had the burden of proof and was unable to substantiate a figure different from that experienced with its covered hoppers, the Commission was under no obligation to produce one and was surely justified in using the only reasonable figure available to it.*

The Court also ignored the fact that the Commission's order was in two parts. One part was mandatory; it ordered cancellation of the rates which had been proposed. The second part was permissive; it authorized reductions of 53 percent, subject to the requirement that there be no discrimination against movements from the Tennessee River ports. To sustain the first or mandatory part of the Commission's order, it was enough that the railroads failed to carry the burden placed on them by section 15(7) of the Act of establishing the validity of the rate changes which they proposed. This portion of the order was in no way dependent upon anything the Commission said with regard to the second or permissive portion. Yet the Court proceeded on the assumption that if any flaw could be found in the permissive part of the order, the whole order should be enjoined.

Further, the Court not only substituted its judgment for that of the Commission on factual issues, but ap-

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* Moreover, the Commission's use of the 20,852-mile figure is immaterial on the issue of the legality of the Southern's rates. A finding that the figure of 40,000 miles was not supported in the record was all that was required to invalidate these rates. The Commission went beyond this, however, and indicated to Southern that it would approve rates reduced by 53 percent instead of by 60 percent as Southern had proposed. The Commission used the 20,852-mile figure in arriving at the 53 percent figure. If its use was improper, the result would be to invalidate both the Southern's proposed rates and the slightly higher level of rates which the Commission approved.

parently sought to remove these issues permanently from the Commission's jurisdiction. In thus setting itself up in place of the Commission as the administrator of the Interstate Commerce Act, it has produced a situation which is fantastic. Division 2 of the Commission approved rate reductions of 60 percent for the Southern, but none for the many other railroad systems serving the Southeast, whose costs were higher. Indeed, the Division found that a 60 percent reduction for those many other roads would result in rates averaging only 83 percent of their out-of-pocket costs in box cars, and only 66 percent in hopper cars. (318 I.C.C. at 680, *infra*, App. E, p. 110a). The full Commission approved rate reductions of 53 percent for all of the roads. The District Court has now, in effect, approved reductions by all of the roads of 60 percent. Rate reductions on this basis have not been approved by either Division 2 or the Commission, and for the roads other than the Southern do not find even an attempted justification in the decision of the District Court.

To permit the District Court's decision to stand would result in the perversion of the rate-fixing process beyond all recognition.

Unfair or Destructive Competitive Practices in Violation of the National Transportation Policy

The District Court in its Findings of Fact identified no finding or holding by the Commission that the level of railroad rates should be raised to avoid unfair or destructive competitive practices in violation of the National Transportation Policy. Yet its Conclusion of Law No. 5 was that:

> The conclusion of the Interstate Commerce Commission that the proposed rates must be increased in order to avoid unfair and destructive competition in violation of the National Transportation

> Policy, 49 U.S.C. preceding Section 1, is invalid and must be set aside because the conclusion violates Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. § 15a(3); it exceeds the statutory authority granted to the Commission; and it is not supported by substantial evidence in the record. (229 F. Supp. at 580, App. A, *infra*, p. 13a)

But the Commission never reached the "conclusion" attributed to it by the District Court. The Commission decided, as already noted, that unregulated trucks represented the railroads' dominant competition on grain movements into the Southeast; that for this reason it would use out-of-pocket instead of fully distributed costs in determining whether the all-rail or barge-rail movements represented the low-cost mode; and that on this basis all-rail was the low-cost mode to most of the destinations involved.* It then went on to make clear that its approval of a 53 instead of a 60 percent reduction was based solely on the lack of compensativeness of Southern's rates and not on any ef-

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* The validity of the Commission's conclusion that unregulated trucks were the railroads' dominant competition is open to serious question but appellants did not attack it in the court below because they were trying to preserve the meager relief afforded them by the Commission. The conclusion was based on a study which purports to compute the amount of grain consumed in the southeastern states, from which figure the known barge and rail movements and the estimates of local production are subtracted. The remainder is assumed to be the truck movement, thereby magnifying any errors in the various computations. Such studies as the appellants could offer indicated that the extent of the truck movement was grossly overstated on the basis of these computations. The Southern had made an extensive questionnaire survey of shippers and receivers of grain in the Southeast which developed actual data relating to the actual movements of grain into the Southeast by truck. Southern introduced parts of this survey for other purposes but refused to disclose what the survey revealed in regard to truck movements and the Commission refused to require it to do so.

fects of the proposed reduction on the barge lines. (321 I.C.C. at 606-607, App. C. *infra*, pp. 39a-40a) The Commission also noted that this action had the effect of eliminating a problem which might otherwise have existed as to movements between certain points where the barge lines were lower cost than the railroads even on an out-of-pocket basis. The proposed 60 percent reduction would have made the rail rates lower than the barge rates on these particular movements and would have raised a question of destructive competition. The Commission did not reach this question, since it found that the problem disappeared when it concluded, on other grounds, that the proposed rates were below a minimum reasonable level and that only a 53 percent reduction would be permitted. The Commission stated in this connection that:

> *In view of our conclusions with respect to the cost evidence*, however, it is unnecessary to determine whether or to what extent a comprehensive rate adjustment, which is adequately compensatory on an overall basis, should be condemned because of the probable harm that would be inflicted by isolated rates. *On the basis of the cost evidence hereinafter discussed*, we conclude that the proposed rates are below a minimum reasonable level. We further find that if the proposed rates are raised to that level, they will not constitute unfair or destructive competition. (321 I.C.C. at 607, App. C, *infra*, p. 40a; emphasis added)

The Commission could hardly have stated any more plainly that its finding as to the proper level of the rates was based on cost considerations and cost considerations alone. It made no finding that the proposed rates would constitute unfair or destructive competition. Such a finding is negated by its express findings that the all-rail routes were the low-cost routes generally, as determined by the use of out-of-pocket costs,

and that since the rail rates were below a minimum reasonable level it was unnecessary to consider separately the port-to-port situations in which the barge lines were the low-cost mode even on that basis.

Assuming, *arguendo*, that the Commission had reached the conclusion attributed to it by the District Court, it by no means follows that such a conclusion was invalid. The Commission used an out-of-pocket cost test in this case to determine that the railroads were overall the low-cost mode in apparent reliance on the dictum of this Court in *New Haven* (372 U.S. at 760-761). At the same time, the Commission indicated that "the fully distributed cost standard . . . is generally the most appropriate yardstick for measuring inherent cost advantages in intermodal competitive rate controversies" (321 I.C.C. at 597, App. C, *infra*, p. 30a), and that it would continue to use that standard where "the special competitive circumstances shown on this record are not present." (321 I.C.C. at 599, App. C, *infra*, p. 32a)

We do not understand *New Haven* as sanctioning use of a double standard in measuring the inherent advantages of carriers entitled to the protection of the National Transportation Policy; and certainly no such double standard can be found in the Policy itself. The far-reaching consequences of such a double standard in any barge versus rail controversy are apparent. Railroads' out-of-pocket costs are inevitably (considering the extent of their fixed investment in track, equipment and the like) a much smaller percentage of their fully distributed costs than is true in the case of the barge lines. If railroads are entitled to an out-of-pocket cost test whenever they face competition from unregulated trucks as well as regulated barge lines; if, on the basis of that test they are adjudged the low-cost mode; and if, being so adjudged, they are

permitted to reduce or manipulate their rates without any consideration whatsoever for the effects on barge lines, or on ports or industries dependent on barge service—then the doctrine of the *New Haven* case has gone far towards eliminating altogether the protection which the National Transportation Policy was intended to afford.

The results to which such a doctrine would lead are indicated in this case by the express recognition on the part of both Division 2 and the Commission that, in the latter's words, "the Southern failed to show that a lesser reduction [than the 60 percent it proposed] would not accomplish its declared purpose" of successfully meeting the competition of unregulated trucks. (321 I.C.C. at 606, App. C, *infra*, p. 39a) Is mode A, which has been determined to be lower cost than mode B only because its dominant competition is unregulated mode C, in a position by reason of such determination to lower rates to a level lower than necessary to meet competition from mode C and thereby to destroy mode B? Would the Commission be absolutely debarred under section 15a(3) and *New Haven*, from invalidating such a reduction as an unfair or destructive competitive practice regardless of its extent or results?

We believe that *New Haven* did not go so far as to require affirmative answers to these questions, and that, had the Commission based its ultimate finding as to the level of the rates in this case wholly or partly on a finding that a 60 percent reduction represented unfair or destructive competition, its action in so doing would have been proper.

Finally, it should be noted that the District Court's approval of a 60 percent rail rate reduction injects into the case the very issue which the Commission's decision avoided—namely, authorization to the rail-

roads to reduce their rates below barge rates on movements where the barge movements were lower cost even on out-of-pocket cost basis. The Court's decision thus directly raises the question of destructive competition in violation of the National Transportation Policy in a way which the Commission's decision did not.

CONCLUSION

It is submitted that the District Court's opinion has made a shambles of the National Transportation Policy and of sections 3(1) and 1(5) of the Interstate Commerce Act. We believe that the resulting questions are substantial and of public importance.

The rates in issue have now been in effect for almost one-and-one-half years. The rates will remain in effect until the judgment of the District Court has been set aside. These appellants have sustained and will continue to sustain irreparable injury so long as the rates are effective. Appellants believe the judgment of the District Court should be reviewed by this Court at the earliest possible time.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 5393

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Plaintiffs*

v.

UNITED STATES OF AMERICA, ET AL., *Defendants*

Opinion

Before: PHILLIPS, *Circuit Judge*, WEINMAN, *Chief District Judge*, and PECK, *District Judge*

PECK, *J.* This suit is brought to set aside and annul an order issued by the Interstate Commerce Commission on July 1, 1963. The statutory basis of the action includes the provisions of Sections 1336, 1398, 2284, and 2321-25 of the Judicial Code (28 U.S.C. §§ 1336, 1398, 2284 and 2321-25), Section 10 of the Administrative Procedure Act (5 U.S.C. § 1009), and Section 17(9) of the Interstate Commerce Act (49 U.S.C. § 17(9)). A temporary restraining order was granted on August 21, 1963, and has remained in effect since that time. *Cincinnati, New Orleans and Texas Pacific Railway Co.* v. *United States*, 220 F. Supp. 46 (S.D. Ohio 1963).

The point of departure in judicial review of an Interstate Commerce Commission determination must always be a recognition of the fact that negative resolution is not to be countenanced in the absence of compelling considerations, but that the existence of such considerations is a possibility. Abundant authority exists in support of each of these two propositions.

Orders of the Interstate Commerce Commission (hereinafter usually referred to as the Commission) when issued within the scope of the Commission's statutory authority and based upon adequate findings supported by substantial evidence are not to be disturbed on review even though the Court might reach a different result on the record. *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 138-140 (1939); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-87 (1934); *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 663-66 (1926); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271 (1926); *Illinois Central Railroad Co.* v. *The Interstate Commerce Commission*, 206 U.S. 441, 454-55 (1907). The credibility of witnesses and evaluation of the evidence are determinations to be made by the Commission alone (*United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945); *Alton Railroad Co.* v. *United States*, 315 U.S. 15, 23 (1942); *United States* v. *Illinois Central Railroad Co.*, 263 U.S. 515, 524 (1924), and it is to be presumed that the Commission has properly performed its official duties; and such presumption supports the Commission's acts in the absence of clear evidence to the contrary. (*Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 512 (1944); *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U.S. 349, 358-59 (1936)).

Opinions of the Supreme Court have repeatedly emphasized that the limitation of the scope of judicial review of Commission determinations is particularly applicable in rate proceedings (*Mississippi Valley Barge Line Co.* v. *United States*, supra.; *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 232 U.S. 199, 221 (1914); *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U.S. 452, 470 (1910)), and for reasons which will hereinafter become obvious the caution of the following quotation must remain in mind:

> "We would depart from our competence and our limited function in this field if we undertook to accom-

modate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked." *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593 (1949).

In spite of the foregoing, as is indicated by the very existence of the machinery for judicial review of Interstate Commerce Commission determinations, it is not the function of a court sitting in such review merely to apply a rubber stamp of approval regardless of whether or not criteria for affirmance are established by the record. On the contrary, to merit judicial approbation the Commission must have made certain basic, essential findings (*Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359, 363-64 (N.D. Ill, 1963)), and such findings cannot be upheld unless they are clear and precise (*Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 510-11 (1935); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-89 (1942). See also, *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634 (1945); *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653-54 (1954)). It thus here becomes our responsibility, giving full recognition to the expertise of the Commission and according to its order all of the presumptions to which it is by law entitled, to make a determination as to whether the Commission's findings are supported by substantial evidence, are clear and precise, and are not arbitrary, capricious, or an abuse of discretion.

When this matter was earlier before this Court on plaintiffs' motions for a temporary restraining order (*Cincinnati, New Orleans and Texas Pacific Railway Co.* v. *United States*, 220 F. Supp. 46, 47 (S.D. Ohio 1963)), we made this observation concerning the mass of material presented:

> "The record before the Interstate Commerce Commission * * * consists of 15,815 pages of testimony and 766 exhibits. Approximately 150 witnesses were called in 139 days of proceedings, and the Commission in its briefs says that the record is 'perhaps the most voluminous' ever made before it."

In view of the negative nature of some of the essential findings which hereinafter appear, mention is made of the fact that before determining that substantial evidence on any point required to be proved did not exist, a diligent and painstaking search of the massive record was made and every lead suggested in the voluminous briefs of counsel was carefully pursued. Supported in the record therefore exists for the negative as well as the affirmative findings of fact which appear below and upon which the conclusions of law which follow are based.

Findings of Fact

1. This cause arises upon a complaint filed by the Cincinnati, New Orleans & Texas Pacific Railway Company and other corporate members of the Southern Railway System seeking to set aside the Report and Order entered by the Interstate Commerce Commission in *Grain in Multiple Car Shipments—River Crossings to the South*, I&S Docket No. 7656, decided on July 1, 1963, by the entire Commission of eleven members, with the three members of Division No. 2 dissenting.

2. The Southern Governors Conference, the Southeastern Association of Railroad and Utilities Commissioners, the City of Cincinnati, and the Secretary of Agriculture

of the United States intervened as plaintiffs and adopted the position of Southern. The Department of Justice filed an answer in which it admitted certain of the allegations of Southern. The Louisville and Nashville Railroad Company and other principal railroads serving the southeastern states of the United States filed an intervening complaint seeking review of the Commission's Report and Order in part.

Numerous protestants in the proceedings before the Commission intervened in this action as defendants including Archer-Daniels-Midland Company; Cargill, Incorporated; Central Soya Company, Inc.; The Merchants Company; Morris Grain Corporation; State Corporation Commission of Kansas; Tennessee Valley Authority; City of Guntersville, Alabama; O. J. Walls, doing business as O. J. Walls Company; John D. Bagwell Farms & Hatchery, Inc.; Southeastern Association of Local Grain Producers, Processors, Merchandisers and Consumers; Tennessee River and Tributaries Association; Waterways Freight Bureau; and The American Waterways Operators, Inc.

3. The proceedings before the Commission arose from the proposal of Southern to reduce rates on shipments of grain by an average of sixty (60%) percent to specified points in the Southeast. The reduced rates would apply only to multiple car shipments of not less than 450 tons of grain from one consignor to one consignee on one bill of lading. The rates were for bare transportation service only and would not cover transit privileges, absorption of connecting line switching charges, and the usual free time for loading and unloading.

The rates as proposed were constructed on a formula of forty-two (42¢) cents per ton for terminal services and .573 cents per ton mile for line haul services. In addition a minimum rate of $2.40 (240 cents) per ton was established. This had the effect of fixing the application of the minimum rate on all shipments traveling less than 346 miles. These

rates are available to shippers from Tennessee River ports on the same basis as to shippers from Ohio and Mississippi River gateways.

4. Southern contemplated the use of five of the newly developed jumbo aluminum covered hopper cars known as "Big Johns" for each 450 ton shipment of grain. Southern owns five hundred of these cars each of which is capable of handling more than one hundred tons of grain, offer a much higher ratio of payload to deadweight than the conventional boxcar equipment, and thus these cars make it possible to transport grain at far less cost. The Commission characterized the development of these cars as "a major breakthrough in the control of cost and a notable advance in the art of railroading." (Comm. Op. p. 7)

Promptly after Southern's publication of these rates and in order to remain competitive with Southern, other railroads serving the Southeast (intervening plaintiffs herein), published comparable reduced multiple-car rates on grain shipment carried in conventional equipment, requiring nine cars (instead of five "Big Johns") to carry the minimum load.

5. These reduced rates were designed to capture for the railroads an increased share of the expanding grain traffic moving from the Middle West into the Southeast, a grain deficit area. In 1960 the movement of at least four million and probably as much as six million tons (estimated sixty (60%) percent of the entire traffic) into the Southeast was accounted for by long haul itinerant truckers. These truckers transport grain into the Southeast as a regulation-exempt backhaul movement after delivering other commodities in the Middle West. These backhaul truckers have complete flexibility in making their transportation charges and may, depending on market conditions, charge as little as expense or gasoline money. From 1955 to 1960 the participation of these backhaul truckers in the long distance movement of grain to the Southeast increased steadily and

tremendously while the rail carriers' share of the total volume declined.

The other methods of transporting grain into the Southeast are by rail from the producing areas, by barge to the Tennessee River ports and thence by truck or rail to the consuming markets in the Southeast which are generally located less than 346 miles from the port cities.

6. The reduced rates proposed by Southern and the other railroads serving the Southeast were scheduled to become effective on August 10, 1961. Upon protest by certain interested parties and under the authority of the Interstate Commerce Act, (hereinafter referred to as the Act), the effective date of the proposed rates was suspended by the Commission, subsequently the suspension was voluntarily extended by Southern, and the Commission undertook an investigation into the lawfulness of the proposed rate reduction.

7. On January 21, 1963, Division 2 of the Commission, which here had initial responsibility, issued a Report and Order finding the proposed rates lawful. On April 12, 1963, upon petitions for reconsideration, the full Commission reopened the proceeding. On July 1, 1963, the Commission issued its Report and Order. The Commission adopted the findings and conclusions of Division 2 with some modification but made the opposite determination. The Commission found that the proposed 240 cent minimum had an effect which would be unduly prejudicial to the Tennessee River ports and unduly preferential to the Ohio and Mississippi River ports in violation of Section 3(1) of the Act (49 U.S.C. 3(1)).[1] The Commission also found

[1] Section 3(1) of the Act provides:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular

that the level of the proposed rates would be inadequately compensatory, unjust and unreasonable, and thus violative of Section 1(5) of the Act (49 U.S.C. 1(5)).[2] The Commission concluded that this violation could be cured by a sixteen (16%) percent increase in the proposed rates, which would be fifty-three (53%) percent lower than the pre-existing rate level.[3]

8. This action was subsequently brought asking that the Commission's order be set aside, annulled and enjoined as not supported by adequate subsidiary findings, as not supported by the substantial evidence of record, as in excess

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description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

[2] Section 1(5) of the Act provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

[3] While the hearings before the Commission were still in progress, the seven-month suspension period allowed by 49 U.S.C. Section 15(7) expired on March 9, 1962. The effective date of the new reduced rates was voluntarily extended by Southern and the other railroads until August 7, 1962. Before this latter date arrived, certain barge lines and shipper interests, including certain of the intervening defendants, obtained temporary restraint against the effectiveness of the new rates. On April 15, 1963, the Supreme Court of the United States, upholding the courts below, held that the courts lacked jurisdiction, prior to the final order of the Commission, to suspend the effectiveness of rates after expiration of the seven-month suspension period prescribed by Section 15(7). *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

of the Commission's statutory authority, as arbitrary and capricious and as constituting an abuse of discretion. Southern also alleged that the Commission's order violated Section 15a(3) of the Act (49 U.S.C. 15a(3)).[4]

9. On August 21, 1963, this Court granted a temporary restraining order under 28 U.S.C. 2284(3) suspending the effectiveness of the Commission's order pending a final determination of this suit. *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *United States*, 220 F. Supp. 46 (S.D. Ohio 1963). Southern's rates have been in continuous effect since May 11, 1963.

10. In support of its conclusion that the rates are unduly prejudicial to the Tennessee River ports and preferential to the Ohio and Mississippi River ports in violation of Section 3(1) of the Act, the Commission found:

(a) That the proposed rates are constructed on a formula which contains a 240 cent minimum operative for distances up to 346 miles. Thus the minimum would not apply to shipments of grain from the Mississippi and Ohio River crossings to the major markets in the Southeast served by the Tennessee River ports since those markets are more than 346 miles from the Mississippi and Ohio River crossings. On the other hand the minimum would be the applicable rate for shipments from the Ten-

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[4] Section 15a(3) of the Act provides:

"In a proceeding involving competition between carriers of different modes of transportation subject to this chapter and chapters 8, 12, 13 and 19 of this title, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. *Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation*, giving due consideration to the objectives of the national transportation policy declared in this chapter and chapters 8, 12, 13 and 19 of this title." (Emphasis added.)

nessee River ports to most of the important markets served by these ports.

(b) That the resultant higher per mile charge from the Tennessee River ports would injure warehousemen and merchandisers of grain, many of whom have substantial investments located at those ports, since these persons would be unable to compete with others located at the Ohio and Mississippi River ports who can offer a lower per mile rate for the transportation of grain to the same destination.

(c) That no substantial difference existed in competitive transportation conditions at the preferred and prejudiced ports. The Commission's subsidiary findings on the similarity of competitive conditions is as follows:

(1) No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced.

(2) Merchants and shippers of grain located at the Tennessee River ports, along with the ports themselves, compete with shippers and other port interests located at the Mississippi and Ohio River crossings.

(3) Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings.

10. The purpose of the multiple car rates was to make the railroads competitive with the dominant long-distance backhaul truck movement of grain from the Middle West to the Southeast. There is no showing that similar long haul truck movements exist in relation to the Tennessee River ports. The record establishes that truck movements in relation to those ports are shorter, less than 346 miles,

and made without backhaul payloads. Expenses and any profit must therefore be realized from this one-way, one-pay haul and those engaged in it cannot afford to transport commodities for gasoline money as can long-distance backhaul truckers.

11. The determination by the Commission that the level of the proposed rates is violative of Section 1(5) of the Act rests in large measure on its prior conclusion that Section 3(1) has been violated by the 240 cent minimum. The Commission determined that when Southern cures that unlawful discrimination, Southern's annual car utilization would decline, its costs would increase, and the proposed rates (without the unlawful discrimination) would not be adequately compensatory. The Commission sought further support for this conclusion by finding:

(a) That there was no reliable evidence of record to support the claimed utilization figure of 40,000 which had been used by Division 2. The Commission therefore computed the return on the basis of an annual utilization figure of 20,852; the same utilization figure as conventional hopper car equipment.

(b) That approval of the reduced rates of the other railroads serving the Southeast would tend to reduce Southern's car utilization.

(c) That Southern's costing procedures duplicated the exclusion of "non-applicable" items of maintenance.

The Court finds:

(1) In reference to (a) above, that Southern entered an exhibit which indicated that their actual experience with the use of "Big John" cars under multiple car rates had been a utilization figure of 60,212 and that these jumbo cars moving on regular rates without restriction as to loading and unloading in single car shipments had a utilization rate of 39,079. The

advantages of these new cars (see finding 4) coupled with the elimination of delays (see finding 3) renders unsound the Commission's use of a utilization rate identical with the achieved on conventional equipment.

(2) In reference to (b) above, the record indicates that Southern computed its proposed rates on the assumption that it would secure approximately sixteen (16%) of the grain shipment involved (Exhibits 68 and 503) and further that Southern has maintained from the outset that the other railroads should also be allowed reduced rates.

(3) In reference to (c) above, the Commission made no findings to support the conclusion as required by 5 U.S.C. 1007.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the parties in this action pursuant to 28 U.S.C. 1336, 2284 and 2321-25, and 5 U.S.C. 1009.

2. The venue of this action is properly laid in this court. 28 U.S.C. 1398.

3. A conclusion by the Interstate Commerce Commission that Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), has been violated must be supported by several findings, including that of the discriminatory treatment under substantially similar transportation and competitive conditions.

The Commission's purported finding on this essential element is inadequate to support the conclusion of a violation under Section 3(1) and is not itself supported by substantial evidence in the record. The conclusion constitutes an abuse of discretion in that it was made despite other findings by the Commission that transportation conditions, as between the points of origin allegedly unduly preferred

and those allegedly unduly prejudiced, are in fact not similar. The conclusion that Section 3(1) of the Act has been violated being invalid must be set aside.

4. The conclusion by the Interstate Commerce Commission that the rates are unlawful as violative of Section 1(5) of the Interstate Commerce Act, 49 U.S.C. 1(5), is invalid and must be set aside because it is based on the invalid premise that Section 3(1) of the Act has been violated and on findings as to car utilization and costing procedures which are not supported by substantial evidence in the record.

5. The conclusion of the Interstate Commerce Commission that the proposed rates must be increased in order to avoid unfair and destructive competition in violation of the National Transportation Policy, 49 U.S.C. preceding Section 1, is invalid and must be set aside because the conclusion violates Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3); it exceeds the statutory authority granted to the Commission; and it is not supported by substantial evidence in the record.

6. The Order of the Interstate Commerce Commission in *Grain in Multiple Car Shipments—River Crossings to the South*, I&S Docket No. 7656, is accordingly null and void, and must be enjoined and set aside.

Conclusion

This opinion shall stand as the Court's findings of fact and conclusions of law within the meaning of Rule 52 of the Federal Rules of Civil Procedure, and in accordance herewith the Order of the Interstate Commerce Commission entered July 1, 1963, will be permanently suspended, annulled and enjoined.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 5393

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL. *Plaintiffs*

v.

UNITED STATES OF AMERICA, ET AL. *Defendants*

Before PHILLIPS, Circuit Judge, WEINMAN, Chief District Judge, and PECK, District Judge.

Judgment

In accordance with the opinion of the Court filed herein May 20, 1964, it is hereby ORDERED

The order of the Interstate Commerce Commission of July 1, 1963 in its docket I. & S. No. 7656, *Grain in Multiple Car Shipments—River Crossings to the South* is hereby set aside and annulled and the operation, enforcement and execution thereof are permanently enjoined.

HARRY PHILLIPS
U. S. Circuit Court Judge

CARL A. WEINMAN
Chief U. S. District Judge

JOHN W. PECK
U. S. District Judge

APPENDIX C

INVESTIGATION AND SUSPENSION DOCKET NO. 7656

GRAIN IN MULTIPLE-CAR SHIPMENTS – RIVER CROSSINGS TO THE SOUTH

Decided July 1, 1963

1. On reconsideration proposed multiple-car rates, minimum 450 tons per shipment on grain from Mississippi and Ohio River crossings to specified destinations in southern territory, and between points in Florida and Georgia found not shown to be just and reasonable or otherwise lawful. Findings in prior report, 318 I.C.C. 641, reversed.
2. Schedules ordered canceled and proceeding discontinued without prejudice, however, to the filing of revised schedules eliminating the unlawfulness herein found to exist.
3. Investigation instituted on the Commission's own motion into the lawfulness of the related single-car rates effective February 28, 1963, and later, reflecting 120 percent of the multiple-car rates.

Appearances as shown in prior report and, in addition, *Peter T. Beardsley, Bryce Rea, Jr.*, and *Richard R. Sigmon* for interveners.

REPORT OF THE COMMISSION ON RECONSIDERATION

WEBB, Commissioner:

By schedules filed to become effective on August 10, 1961, and more fully described in the prior report of division 2, the Southern Railway System (Southern) and other rail carriers in the South[1] (the Louisville & Nashville and others) proposed to establish all-rail rates[2] on grain,[3] but not including products of grain, in multiple-car lots, from certain Ohio and Mississippi River crossings[4] to specified points in southern territory.[5] Following protest and suspension, the effective date of the schedules was

[1]Including, among others, the Louisville and Nashville Railroad Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railroad Company, and the Illinois Central Railroad Company, hereinafter referred to by their short names.

[2]Rates and costs are stated in cents per net ton unless otherwise indicated.

[3]Including wheat, buckwheat, corn, oats, rye, barley, grain sorghums, and soybeans.

[4]St. Louis, Mo.; East St. Louis, Cairo, and Metropolis, Ill.; Evansville, Ind.; Louisville, Ky.; Cincinnati, Ohio; and Memphis, Tenn.

[5]Southern territory, as used in the tariffs and in this report, includes points in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee.

postponed to and including August 7, 1962. None of the proposed rates became effective on that date, however, because of the pendency of a civil action to enjoin the respondents from making the schedules effective prior to the Commission's decision.

On April 15, 1963, the Supreme Court of the United States held that the Federal courts do not have power to enjoin the operation of proposed schedules upon the expiration of the 7-month period of suspension prescribed in section 15(7) of the Interstate Commerce Act. *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U. S. 658. Prior to the Court's decision, division 2 had found in its report of January 21, 1963, 318 I.C.C. 641, that the proposed grain rates of the Southern, minimum 450 tons, 90 tons per car, were lawful. These rates were made effective by the Southern on May 11, 1963. Previously, on May 6, 1963, the Southern and the other rail respondents canceled their proposed rates, subject to minima of 900 and 1,800 tons, which division 2 had found not shown to be lawful.

The Commission, by order dated April 12, 1963, reopened the proceeding for reconsideration on the present record. This action was taken in response to petitions filed by the affected grain trade and port interests, the Tennessee Valley Authority, barge-line protestants, motor and water carrier associations, and rail carriers other than the Southern. Replies were filed by rail respondents, various protestants, the United States Department of Agriculture, and the Southern Governors' Conference. A request for oral argument by respondents Louisville & Nashville and others was denied.

Remaining in issue in this proceeding are the rates proposed by the Southern, minimum 450 tons, 90 tons per car, and the rates proposed by the L & N et al. which are subject to a minimum of 450 tons, 50 tons per car.[6] In this report, we shall also refer to certain single-car rates which are not directly in issue and which became effective February 28, 1963, and later. These single-car rates are subject to a minimum of 90 tons in the Southern's jumbo covered hopper cars, but for the Louisville & Nashville and others they are subject to a minimum of 50 tons in conventional equipment. In all essential respects, the single-car rates are the same as the proposed multiple-car rates except that the former are 20 percent higher. Although the single-car rates were protested, division 2 declined to suspend them or to place them under investigation.

[6] Rates proposed by the Louisville & Nashville and others, found by the prior report not shown to be lawful, also became effective on May 11, 1963.

Our conclusions differ from those reached in the prior report. However, except to the extent herein modified or reversed, we affirm and adopt as our own the findings of fact and conclusions of law set forth in the report of division 2. For the sake of clarity, however, we shall compare briefly the rates proposed with the present rates of the protestants and the respondents.

The proposed rates per ton are based on the docket No. 28300[7] short-line distances, multiplied by 0.573 cent, plus 42 cents for terminal service. For distances of 346 miles or less the proposed rate is 240 cents, minimum 450 tons. The proposed rates, as well as the related single-car rates, include no transit privileges, do not provide for the absorption of connecting line switching charges; and are subject to rules and charges designed to discourage the detention of cars. The present rates on grain and grain products provide for transit, absorption of switching charges, and other privileges not accorded in connection with the proposed rates or the single-car rates related thereto. Even though a less complete service would be provided under the proposed reduced rates, the reductions, as shown by the following table, are drastic.

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[7] *Class Rate Investigation, 1939*, 262 I.C.C. 447.

Comparison of present and proposed rates on corn from two principal river crossings to representative destinations[1]

From—	To—	Docket 28300 mileage	Proposed rates	Present rail rates	Present barge[2] or barge-rail rates[3]	
					Via or to Guntersville, Ala.[4]	Via or to Chattanooga, Tenn.
Evansville, Ind.	Guntersville, Ala	364	258	710	[5]211	
	Birmingham, Ala	361	267	710	[5]236	
	Atlanta, Ga	444	298	830	520	747
	Flowery Branch, Ga	478	319	870	610	807
	Gainesville, Ga	494	328	890	650	827
	Asheville, N. C	516	338	910	630	827
St. Louis, Mo.	Guntersville, Ala	517	321	910	990	847
	Birmingham, Ala	472	312	870	239	
	Atlanta, Ga	601	386	1,010	548	755
	Flowery Branch, Ga	638	408	1,030	638	835
	Gainesville, Ga	654	417	1,050	678	855
	Asheville, N. C	660	420	1,030	658	885
					1,018	875

[1] The principal consuming States in the Southeast are Georgia and Alabama.

[2] Minimum tariff weight is 750 net tons via Arrow Transportation Co.

[3] Barge-rail rates include transfer charge of 89 cents.

[4] Guntersville is served by the Louisville & Nashville but not by the Southern.

[5] As shown on page 662 of the prior report the several bargelines mentioned there publish two different rates from Evansville to Guntersville.

DISCUSSION AND CONCLUSIONS

It is important to bear in mind that all modes of transportation – rail, water, and motor – have been transporting a progressively larger volume of grain in recent years into the Southeastern States. This fact is not disputed by any of the parties of record. It is true that the rail carriers' share of the total volume has declined, but the testimony of one of the Southern's own witnesses indicates that rail shipments of grain into the Southeast increased from approximately 2,000,000 tons in 1956 to approximately 2,500,000 tons in 1960. According to the same witness and according to the bargeline protestants as well, water carriers increased their total tonnage from approximately 900,000 tons in 1955 to approximately 2,250,000 tons in 1960. The protestants and the respondents agree that motor carriers increased their volume of grain traffic during the same period, although they disagree concerning the amount of that increase. In other words, the proposed rates were not designed to counteract any actual erosion of rail grain traffic but to secure for the proponents a greater share of a growing volume of traffic and to forestall diversion of traffic.

No inference should be drawn from the absolute increase in rail tonnage that the respondents' fears respecting diversion were groundless. On the contrary, their 20-percent increase in the volume of traffic transported in 1960 as compared with 1956 could reasonably be interpreted as an ominous trend in view of the very much larger increase in the volume of available traffic. As indicated, the water carriers' share of the total tonnage increased much more rapidly. As will be shown, the percentage of the total traffic moved by unregulated motor carriers increased at an even greater rate. It will be sufficient to note here that the Southeast, historically a grain deficit area, has dramatically increased its consumption of grain, a principal reason being its concentration on the production of broilers. Georgia produced 3,500,000 broilers in 1940; 62,900,000 in 1950; and 320,250,000 in 1960. Alabama produced a mere 1,700,000 broilers in 1940; only 13,000,000 in 1950; but 176,600,000 in 1960. Under the circumstances, we believe that the respondents were fully justified in striving to increase their share of the available traffic or at least to arrest the diversionary trend.

In pursuing these objectives, the Southern developed a large aluminum, covered hopper car capable of handling a revenue load

in excess of 100 tons. These are the so-called "Big John" cars, a well-advertised technological achievement. We have no hesitancy in finding, as requested by the Southern, that the "Big John" car represents a major breakthrough in the control of cost and a notable advance in the art of railroading. We agree with division 2 that the Southern's technological innovation is an example of managerial initiative and ingenuity which the national transportation policy was intended to promote. At the close of the hearing, the Southern owned over 500 "Big John" cars representing an investment of $13 million. Unquestionably, the Southern will reap its just reward by being able to transport grain in larger volume, at a greater profit, and at rates lower than would otherwise be prudent or lawful.

Our duty here is to resolve an intermodal, interterritorial, and intra-industry controversy within the contours of the applicable law, a full record, and our own knowledge concerning the carriers and other interests involved. All modes of surface transportation have made astonishing technological improvements under the press of hard and pervasive competition. It would be especially inappropriate to accord favored treatment here for one innovation of one mode when the record clearly shows that the technological achievements of the bargelines, although not so well publicized, are no less striking.

In their brief the protestant bargelines summarize the evidence of record showing that modern bargeline equipment includes dieselized, multiple-screw towboats with "fingertip" control to afford maximum maneuverability; propeller housing in depressions in the bottoms of towboats to permit operation with increased horsepower without deepening the river channels; use of the Kort nozzle that directs and controls the flow of water about the towboat propellers to increase their thrust by 25 percent; the development of welded steel "semi-integrated" barges having one end raked and the other end square for combination in tows offering the greatest capacity with the least resistance, development of specialized barges such as aluminum or rubber-lined barges for handling commodities that require such equipment, barges with rollback covers, as well as airtight barges, for protection against weather and moisture, double-skinned barges for protection against damage from leakage, partially double-skinned barges with higher-than-usual coamings offering protection against leakage as well as providing greater cubic capacity, and insulated barges for transporting commodities requiring either refrigeration or heat-

ing; and, finally, navigational aids such as radar, sounding machinery, seagoing gyrocompasses, radio-telephones to communicate with passing towboats, and automatic pilots that allow mechanical steering and increased speed by using less rudder.

The discussion which follows is devoted to particular issues on which we believe that the conclusions reached in the prior report should be reversed, modified, or expressly affirmed.

PUBLIC COSTS

As used in the prior report, the term, "public costs," refers to the cost incurred by governmental agencies in making and keeping navigable the inland waterways, including the Tennessee River. The term is used in the same sense in this report, although reference is also made to the "public costs" associated with rail and motor transportation.

In the prior report, the issue of "public costs" was considered "to have a vital effect on the use of barge costs for the purpose of making intermodal cost comparisons between rail and barge or barge-rail transportation." More specifically, the question was said to concern "the amount of 'public costs' assignable to barge transportation and the use of 'fully distributed costs for intermodal cost comparisons." In summarizing the Southern's evidence respecting investment and maintenance costs on the Mississippi and Tennessee River systems, the division recognized that the allocations as between navigation, on the one hand, and flood control, power, and recreation, on the other, were necessarily arbitrary.

The division first made it clear that in "determining merely the reasonableness of the level of particular rates to be charged shippers by water carriers, the Commission has never considered, as a cost factor, any expenditures of public funds directed and appropriated by the Congress." After noting this limitation on the use of "public costs," the division then made the following finding:

> Nevertheless, it is manifest that in competitive ratemaking where one mode does assert the inherent advantage of low cost in performing a service, sound economics plainly require that all costs, including "public costs," which go to make up the asserted inherent advantage must, in all justice, be considered. As we understand the term "inherent," it can have no reference other than to permanent, essential, intrinsic characteristics. That an allocation of "public cost" is a factor to be considered in determining whether an inherent advantage exists is clear, and we so find.

Having made the above finding, the division concluded: "we cannot find that protestants have the inherent advantage of low cost since their showing fails to consider the significant matter of an allocation of 'public costs' to their operations." If the division's affirmative finding was correct, its negative finding was justified by the protestants' failure to produce relevant data supporting their claim of inherent cost advantage. *Various Commodities from or to Arkansas and Texas*, 314 I.C.C. 215.[8]

The prior report then compared, but with "public costs" aside, the fully distributed cost figures for representative barge-rail and all-rail movements. The division concluded that "it cannot be found that inherent cost and service advantages lie with either rail or barge-rail movements." It is clear, therefore, that the division's discussion and conclusions respecting "public costs" did not affect its evaluation of relative inherent cost advantages on the basis of conventional standards.

Finally, it was made clear in the prior report that the division's ultimate conclusions "turn on the aspect of the competition to be met; i.e., unregulated truck movements, rather than on the basis of who has the inherent advantage, with or without 'public cost' considered, as between the modes parties to this proceeding." In sum, the findings and conclusions respecting "public costs" were not necessary to the decision. On the other hand, the prior report indicates that the failure of the protestants to account for "public costs" would have been fatal to their claim of inherent cost advantage even if unregulated trucking had not been found to be the predominant competitive mode with respect to the traffic involved.

Although the division's discussion of "public costs" was in the nature of dictum, it has served a beneficial purpose. Heretofore, the Commission has not had an opportunity to consider on the basis of evidence developed in a formal proceeding the relevancy of public expenditures in determining the inherent advantages of the benefited modes. Our conclusions, based in part on arguments advanced in petitions for reconsideration which were not before the division, differ from those reached in the prior report.

The Commission's function in this proceeding is adjudicatory in nature and should not be construed as expressing any opinion

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[8] This proceeding is now pending on reconsideration. However, the principle for which the case was cited above was approved by the Supreme Court in *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 372 U. S. 744 (1963).

with respect to the imposition of charges on users of the inland waterways. This proceeding must be determined in accordance with the Interstate Commerce Act and the national transportation policy, as written, and not as they might have been written. If there are inequities in other legislation which sap the strength of fully regulated carriers, this is not the forum in which to seek their correction. In that context we conclude, for the reasons hereinafter set forth, that "public costs" are irrelevant in any Commission determination of the claimed inherent cost advantage of any carrier or group of carriers.

"Inherent" is usually defined as some permanent, essential, or intrinsic characteristic. It may be that the inherent advantages of a particular mode of transportation need not be derived solely from the laws of economics and technology. In the case of water transportation, "public costs" have been more permanent in nature than any particular phase of the technical art. For more than a century, an essential characteristic of such transportation has been its dependence upon the free use of inland waterways developed and maintained by governmental agencies.

In any event, the dictionary meaning of the word "inherent" is not controlling. Long before the term "inherent advantages" appeared in the national transportation policy, the Congress regularly appropriated large sums for the improvement of rivers and harbors. Since 1940, those expenditures have increased substantially. Assignment of "public costs" to the cost structure of bargelines assumes that such carriers, for the purpose of determining their inherent advantages, ought to pay user charges or tolls in an amount sufficient to defray their share of the total cost of waterway development and maintenance. That assumption is diametrically opposed to the long established policy of the Congress. It is inconceivable that the Congress intended this Commission to exercise any veto power over its programs for inland waterway improvement. Such a veto power, however, necessarily would be exercised whenever this Commission considered "public costs" in evaluating in intermodal competitive rate cases the inherent advantages asserted by bargelines. For example, when the Congress appropriates money for the construction of new locks, without establishing tolls for the use thereof, the Congress has concluded, in effect, that barge transportation should be encouraged and that the resulting public benefits justify the cost involved. However, the injection of such construction costs into the cost structures of the bargelines would make their

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traffic more susceptible to diversion by other modes. Whether the effect would be to decrease or to prevent the use of expensive new locks is immaterial, since in either case the purpose of the Congress would be frustrated.

Even if the policy of the Congress were not so well settled, it would be impossible for the Commission, as a practical matter, to allocate "public costs" among the multipurpose objectives of river and harbor improvements, not to mention the impossibility of assigning a fair share of the "public costs" so allocated to the cost structure of a particular carrier or group of carriers. In the prior report, the cost allocations made by the Southern in this proceeding were found to be arbitrary. Such allocations are necessarily arbitrary. For example, the Board of Investigation and Research at pages 339-360 of its report, *Public Aids to Domestic Transportation* (1944), emphasized that only very rough estimates could be made respecting the annual cost of waterway improvements for navigational purposes. Among the problems discussed were the assignment of maintenance to the years benefited; eliminating costs for obsolete facilities; selecting the period of amortization of the waterway investment; allocating multipurpose waterway costs among functions; allocating costs of facilities that serve more than one project; and computing unit costs. Some of these difficulties were discussed and similar conclusions reached by the Federal Coordinator of Transportation in *Public Aids to Transportation*, 23-31 (1939); by the National Resources Planning Board in *Transportation and National Policy*, 262-263 (1942); by the President's Water Resources Policy Commission in *A Water Policy for the American People*, 211-217 (1950); by the United States Department of Commerce in *Rationale of Federal Transportation Policy*, 40-42 (1960); and by the Senate Commerce Committee's Special Study Group on Transportation Policies in the United States, S. Rep. No. 445; 87th Cong., 1st sess., at pages 205-209 (1961), the so-called Doyle Report.

The fact that allocation of "public costs" would create insurmountable problems for the Commission does not mean, of course, that the Congress is unable to establish a fair schedule of user charges to defray a part of the Federal Government's costs in providing and maintaining navigation improvements. That question is once again before the Congress by virtue of a recommendation made by the President in his Transportation Message to the Congress in April 1962. H. Doc. No. 384, 87th Cong., 2d sess. In this connection, the essential difference between legislative action and

administrative action must not be overlooked. The Congress, unlike the Commission, may disregard certain portions of the "public costs" involved in navigation improvements and may translate such costs into carrier costs gradually and prospectively for the purpose of avoiding undue financial hardship. Conversely, the Commission, in determining in intermodal barge-rail rate controversies where the inherent cost advantage lies, cannot make findings based on rough estimates or make intuitive judgments informed by exposure to all of the political crosscurrents involved.

What has been said thus far, however, fails to indicate the size of the "Pandora's box" which the respondents urge us to open. If an allocation of "public costs" is a factor to be considered in evaluating inherent advantages claimed by bargelines, "public costs" necessarily would have to be considered in cases where motor carriers claim to be the low-cost mode. The problem here, of course, is that it is impossible to determine in any intermodal rate proceeding, or even in a general investigation, whether the regulated trucking industry pays too much or too little for its use of the public highways. If the respondents' arguments were accepted, however, the Commission presumably would be required to consider whether gasoline and other taxes paid to a particular State were excessive and should, to that extent, be disregarded in determining the "true" costs of the motor carriers involved.

Perhaps the most difficult undertaking of all would be to make even a rough approximation of the "public costs" which, for the sake of fairness and uniformity, would have to be reflected in the fully distributed costs of rail carriers. Such public costs may be relatively small but their existence is undeniable. They include such items as flood control benefits, harbor improvements, occupancy of public streets, tax relief, Government loans, and various minor subventions. Such problems as these reinforce our conclusion that the "public cost" question is peculiarly within the competence of the Congress to determine but lies far beyond the authority delegated to this Commission

Consideration of "public costs," as urged by the respondents in this proceeding, would also be contrary to sound principles of accounting. Inherent advantages must be determined on the basis of costs of operation which the different modes actually bear and not on the basis of hypothetical costs which would have been incurred if the historic policy of the Congress were different. Furthermore, the consideration of fictitious or hypothetical costs would be contrary to a recent precedent of the entire Commission.

Iron or Steel Scrap from Conn., Mass., and R. I. to Pa., 318 I.C.C. 567, decided December 3, 1962. In that proceeding, the Commission considered the cost of purchased transportation as the actual cost of the respondent motor carrier in performing the service in question and declined to consider as the costs of the carrier the costs of owner-operators who supplied the purchased transportation.

As indicated, consideration of "public costs" in determining inherent advantages would be contrary to history, congressional intent, and sound accounting principles, and would be inimical to efficient administration of the Interstate Commerce Act. Finally, since no carrier would ever be able to establish the hypothetical costs properly assignable to its operations or to those of its competitors, acceptance of the respondents' arguments on the "public cost" issue would emasculate section 15(a)(3) of the act and would repeal the inherent advantages clause of the national transportation policy.

TRUCK MOVEMENT OF GRAIN INTO THE SOUTHEAST

One of the most important factual issues in this proceeding is the volume of grain moving by truck into the Southeastern States.[9] The pivotal nature of this issue is indicated by the space devoted to it in the prior report and in the briefs and exceptions and replies of the parties. The difficulty in determining the volume of movement is that virtually all truck shipments of grain are exempt from Commission regulation and most of the carriers involved are not certificated by the Commission. The traffic is transported chiefly by private carriers as a backhaul movement, by buy-and-sell operators who commingle merchandising and transportation activities, and by for-hire carriers of exempt agricultural commodities who haul produce out of the Southeast, principally Florida, and grain as a return load. Because of the nature of this exempt truck transportation, reliable statistics concerning the truck movement of grain are not and cannot be regularly compiled. The Southern's method of statistical deduction was designed to provide this information.

[9] The term "Southeast," as used in this section of the report, includes the nine States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

As previously indicated, the protestants and the respondents agree that approximately the same volume of grain is transported to the Southeast by rail as by water under differentially higher all-rail rates. The parties also recognize that the bargeline tonnage has increased much more rapidly than the rail. The drastic reduction proposed by the Southern is based on its conviction that over 6 million tons of grain, approximately 60 percent of total traffic, moved by truck in 1960 to the Southeast, whereas the volume of grain trucked in 1955 was only 700,000 tons. On the other hand, the bargeline protestants contend that only about 1 million tons of grain moved by truck into the Southeast in 1960.

The Commission has recognized that regulated carriers should be given considerable leeway in meeting the competition of private and other carriers not subject to Commission regulation, particularly where such competition is clearly dominant. The Southern's method of estimating the volume of grain trucked into the Southeast thus assumes a critical importance in view of the legal consequences flowing from its acceptance or rejection.

To measure the truck movement of grain into the Southeast, the Southern calculated the grain deficit in that region by comparing total utilization with production in the area. The Southern's statistical method is illustrated by the following table.

Item	Tons for crop or calendar year (exhibit 748)
(1) Consumption or utilization of grain for cornmeal and wheat flour milling, distilled spirits and beer, and seed	2,069,000
(2) Poultry and livestock feed	19,802,000
(3) Net change in stocks (increase)[1]	343,000
(4) Rail and water shipments out of the Southeast	2,244,000
(5) Total utilization	24,458,000
(6) Production of grain within the Southeast	13,739,000
(7) Grain deficit	10,719,000
(8) Rail and water shipments into the Southeast	4,159,000
(9) Derived truck shipments of grain into the Southeast	6,560,000

[1] A net increase in stocks increases "total utilization" (item 5), since that term is used to indicate the amount of grain that must be obtained from production and inbound shipments via all modes of transportation.

Items (1), (3), and (6) are based upon reasonably accurate statistics which are not seriously challenged. Items (4) and (8) are derived from the Commission's waybill statistics and from data compiled by the U. S. Army Corps of Engineers. Items (5)

and (7) are merely mathematical computations. It is apparent, therefore, that the Southern's calculation of the inbound volume of truck shipments, item (9), depends almost entirely upon the accuracy of the figure shown in item (2), the amount of grain fed to poultry and livestock in the Southeast. In fact, the amount attributed to grain fed to poultry and livestock is such a large percentage of the total estimated consumption for all uses that any error respecting one of the types of consumption shown in item (1) would not materially affect the figure shown in item (9).

The Southern's estimate of feed consumption by poultry and livestock involves some complex computations based upon grain consuming animal units (GCAU's). These calculations are described in the prior report and in the pleadings as the GCAU method. That method was developed by the U. S. Department of Agriculture and is the only currently available method of determining poultry and livestock feed utilization within a particular area. It should be noted that the GCAU method was not developed with this proceeding in mind but was conceived more than 20 years ago with a view toward providing the agricultural community with reliable data respecting grain fed to poultry and various classes of livestock through the United States.

Essentially, the protestants' criticism of the Southern's estimate of truck shipments of grain into the Southeast is an attack upon the validity of official statistics regularly published by the Department of Agriculture long before the "Big John" car was developed. To discuss in detail the Southern's adaptation of the GCAU method would unduly and unnecessarily prolong this discussion. This matter is discussed at length in the prior report. No material errors in that discussion have been shown by the protestants. In addition, the 28-page reply of the Department of Agriculture is devoted exclusively to a rebuttal of the protestants' argument that division 2 erred in concluding that the GCAU method of estimating grain deficits is reliable for the purpose of estimating the volume of truck shipments into the Southeast. We find the Department's reply to be wholly convincing. Accordingly, we hereby expressly affirm the finding of division 2 that the actual volume of grain shipments transported by unregulated motor carriers in 1960 was from about 4 million to more than 6 million tons and more probably nearer the latter figure. We have considered various studies cited by the protestants[10] but

[10] The North Central Region (NCM) Studies of the Land Grant Colleges, the U.S.D.A.—Haldeman Study, and the Georgia Commission study.

they are not sufficiently comprehensive to impair the foregoing conclusion.

DETERMINATION OF THE LOW-COST MODE

Protestants assert that division 2 erred in failing to find that fully distributed costs are the proper determinant of which mode has the advantage of lower cost. The prior report noted that this matter "is presently before the Supreme Court on appeal from the lower court decision in *New York, New Haven & Hartford R. Co. v. United States*, 199 F. Supp. 635 (D.C. Conn. 1961)," but concluded that in view of the unregulated truck competition, it was unnecessary to determine "who has the inherent advantage, with or without 'public cost' considered, as between the modes parties to this proceeding." Accordingly, division 2 did not decide what yardstick should be used in making intermodal cost comparisons. The Southern's contention that division 2 rejected fully distributed costs as the proper standard of comparison is not supported by a fair reading of the prior report.

Notwithstanding our agreement with the views expressed in the prior report relative to the extent and the severity of unregulated truck competition, it is necessary in this proceeding, in our opinion, to determine the relative inherent advantages of the protestant carriers and the respondents in transporting the traffic in question. That determination must be made in the light of the Supreme Court's recent decision in the *New Haven* case. *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 372 U. S. 744 (1963).

Since the enactment of the Transportation Act of 1958, the Commission generally has held that fully distributed cost is the appropriate standard to be used in determining which of two competing regulated modes is the low-cost form of transportation.[11] Prior to the passage of section 15(a)(3), the Commission advised the Congress that for the purpose of ascertaining the most economical form of carriage, full costs ordinarily should be the test.[12]

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[11]The cases decided since the Transportation Act of 1958 until July 24, 1961, are reviewed in Harbeson, *The Regulation of Interagency Rate Competition Under the Transportation Act of 1958*, 30 I.C.C. Pract. J. 287 (1962).

[12]Testimony of Chairman Howard G. Freas on March 28, 1958, before the Surface Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, page 1839.

After the enactment of section 15(a)(3), the Commission advised the Congress to the same effect but pointed out that: "Ordinarily, the most economical mode should be determined by using full cost as a basis. But this does not mean that comparisons of full costs always provide an adequate and complete basis for determining relative inherent cost advantages between modes within the meaning of the national policy declared in the Act."[13]

In its reply to petitions, the Southern maintains that the fully distributed cost standard involves an allocation of constant costs to particular units of service which is of necessity arbitrary. There can be no doubt that an apportionment of constant costs to arrive at the fully distributed cost of a particular movement represents an effort to allocate costs which are essentially, and by definition, unallocable. The Commission's cost finding section has recognized this fact. Statement No. 4-54, Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs. The lower court in the *New Haven* case alluded to some of the logical and practical difficulties involved in making intermodal cost comparisons on the basis of fully distributed costs. This is one of the subjects involved in the rulemaking proceeding instituted by the Commission last year in docket No. 34013, Rules to Govern the Assembling and Presenting of Cost Evidence.

Although the fully distributed cost standard requires an assignment of constant costs to particular traffic, that standard is generally the most appropriate yardstick for measuring inherent cost advantages in intermodal competitive rate controversies. Even though the fully distributed cost standard is marred by theoretical and practical infirmities, it has been instrumental in preserving the inherent advantages of carriers whose traffic repertoire is so limited that they cannot afford to transport several of their most important commodities at less than the full cost of performing the service. In apparent recognition of the accounting and regulatory problems involved, the Supreme Court in its *New Haven* opinion left open the precise manner in which inherent cost advantages should be measured or protected. The Court said, at page 760 of its opinion:

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[13] Letter of Chairman John H. Winchell dated August 15, 1960, to the House Committee on Interstate and Foreign Commerce, on H. R. 7310, and the Chairman's letter dated September 16, 1960, to the Senate Committee on Interstate and Foreign Commerce, on S. 3048.

It may be, for example, that neither a comparison of "out-of-pocket" nor a comparison of "fully distributed" costs, as those terms are defined by the Commission, is the appropriate method of deciding which of two competing modes has the cost advantage on a given movement.[13]

Footnote 13 of the Court's opinion reads as follows:

The utility of the concepts of fully distributed and out-of-pocket costs may be limited to the area in which they have traditionally been used—that of determining the reasonableness of a rate from the standpoint of a carrier's own revenue requirements. If so, some different measure may be preferred for comparing the costs of two or more modes of transportation.

Nevertheless, the Supreme Court made it clear that whatever the cost standard employed, the Commission must determine the inherent advantages of cost and service asserted in that intermodal competitive rate controversy. Although it was not necessary for division 2 under its view of the case to make any intermodal cost comparisons, the prior report sets forth such comparisons on a fully distributed basis on shipments of grain from St. Louis, East St. Louis, and Evansville, the main points of origin, to representative points in the destination territory. On the basis of those fully distributed cost comparisons the prior report concluded that, "it cannot clearly be found that the inherent advantages, comprehending both cost and service, lie with either the Southern's all-rail routes or with the barge-rail routes, the latter including transfer charges." We do not agree.

As recognized by the prior report, the barge routes are the low-cost mode on the basis of fully distributed costs from the principal origins to the Tennessee River ports and by amounts which in most instances are very substantial. With respect to the barge-rail routes, the prior report found that from the principal origins "via barge to Chattanooga and Knoxville, and the Southern beyond, to Birmingham and Selma, Ala., Palatka, Fla., and Atlanta, Columbus, and Macon, Ga., the barge-rail movements, including the transfer charge, would be the low-cost mode, except for movements from Evansville, beyond Knoxville, to the destinations indicated where all-rail movements would have the low-cost advantage." The exception is irrelevant for the reason that no bargeline would haul grain destined to points in Alabama, Georgia, or Florida past Guntersville, Ala., and Chattanooga to Knoxville, since that would involve time-consuming, expensive, and unnecessary movements by both barge and rail. The prior report, in noting that barge-rail routes via Guntersville to Alabama, Florida,

and Georgia are the low-cost routes, also adds an irrelevant exception to the effect that the Southern's all-rail routes are low-cost to points in Tennessee and the Carolinas. Barge-rail grain would normally move to such points via Knoxville.

The cost evidence does indicate that the all-rail routes, because of barge-rail circuity, are low-cost on a fully distributed cost basis from Evansville to certain destinations in the Carolinas and eastern Tennessee. These exceptions, however, do not preclude a positive finding that for the practical purposes of decision, the barge and barge-rail routes must be found to be the low-cost mode on the basis of fully distributed costs. They hold that advantage from the principal origins to the major consuming areas in the Southeast, particularly Georgia and Alabama. Moreover, the record shows that at least one of the barge-rail routes from St. Louis or East St. Louis via Guntersville, Chattanooga, or Knoxville has the fully distributed cost advantage to every named destination in every destination State for which comparisons were made.

In the prior report, division 2 found that the dominance of unregulated truck competition made it unnecessary to determine "who has the inherent advantage * * * as between the modes parties to the proceeding." We do not find it necessary to decide this proceeding on so broad a ground. For example, if a protestant regulated mode were found to possess the inherent advantage of low cost under both the fully distributed and out-of-pocket bases, we would not necessarily conclude that the proponent regulated mode, in the absence of any actual loss of traffic, could meet the dominant competition of an unregulated mode without regard to the effect of such action on the low-cost mode.

Our departure in this proceeding from the fully distributed cost standard ordinarily employed in resolving intermodal competitive rate cases should not be interpreted as a rejection of that standard in proceedings in which the special competitive circumstances shown on this record are not present. But where a majority of the traffic involved is moving by an unregulated mode and is readily susceptible to competition by a regulated mode, we believe that the inherent advantages of competing regulated modes should be evaluated in the light of a cost standard that will encourage increased movement by a regulated mode.

In this proceeding, a comparison of out-of-pocket costs is clearly the most appropriate method of determining whether the rail respondents or the protestant bargelines possess the

inherent competitive advantage on the traffic in question. The out-of-pocket costs of the Southern, as restated herein, are set forth in appendix B of this report. The protestant bargelines introduced no evidence respecting their out-of-pocket costs and do not contend that they are the low-cost mode on that basis. However, it reasonably may be inferred from the cost evidence of record that the out-of-pocket costs of the bargelines on some of the port-to-port movements are lower than the corresponding all-rail costs, since the bargelines' full costs are either lower or only slightly in excess of rail out-of-pocket costs.

At this point it should be noted that the Commission has not determined the so-called percent variable for bargelines. The percent variable figure is the percent of a carrier's total operating expenses, rents, and taxes which at a given level of traffic are found to vary with the volume of traffic handled. Such variability studies have been made for railroads and the prior report found that 80 percent continues to be a reliable percent variable for the Southern system. For bargelines, the percent variable has been estimated to be about 90 percent.

Appendix A attached hereto compares all-rail and barge-rail costs on selected movements of the commodities involved herein. The table in appendix A shows intermodal barge-rail and all-rail costs on two bases: (1) fully distributed costs; and (2) out-of-pocket costs. The cost comparisons are those between all-rail movements over the Southern Railway System and combination barge-rail movements, wherein the rail leg beyond Chattanooga is also over the Southern Railway System. The origins are St. Louis, Mo., and East St. Louis, Ill., and Evansville, Ind. Destinations are selected points in Alabama, Florida, and Georgia.

The record does not show barge out-of-pocket costs, but we have compared the costs of the two types of movements from the available costs of record. Columns 2 through 7 of the appendix show the all-rail fully distributed costs, the barge fully distributed costs to Chattanooga, the barge-to-rail transfer costs at Chattanooga, the restated rail costs beyond Chattanooga to the selected points, the total barge-rail costs, and the difference in costs in each instance in favor of barge-rail over all-rail.

Columns 8 through 14 are based on out-of-pocket cost comparisons. Column 8 shows the all-rail out-of-pocket costs from the origins concerned to the selected destinations. Column 9 shows the barge fully distributed cost to Chattanooga; column 10, the barge-to-rail transfer costs; and column 11, the rail

out-of-pocket costs from Chattanooga to the selected destinations. Column 12 shows the total barge-rail costs with transfer including barge fully distributed and rail out-of-pocket costs. Column 13 shows the difference in favor of the all-rail costs shown in column 8, when compared to the barge-rail costs shown in column 12. While the barge-rail costs show the barge costs on a fully distributed basis, it can be seen in column 14 that a large percentage reduction would be necessary in the barge fully distributed costs in order for those costs to meet the all-rail out-of-pocket costs. The information contained in appendix A, therefore, leaves no room for doubt that the out-of-pocket costs for barge-rail movements are far above those for the all-rail movements. Any contrary conclusion would have to be based on the patently erroneous assumption that the percent variable for bargelines is not in the neighborhood of 90 percent but in the neighborhood of 65 percent.

To express in a slightly different way the propriety of using out-of-pocket costs as the yardstick in this proceeding, this is the only cost determinant which will enable one of the regulated modes to compete successfully against the dominant competition provided by an unregulated mode of transportation. In other words, the respondents possess certain inherent advantages in competing against unregulated motor carriers which the bargeline protestants do not possess. They enjoy three principal advantages over carriers whose constant costs are relatively much smaller or whose traffic is less varied.

First, a large portion of railroad investment costs are necessarily and irrevocably "sunk" in the business of transportation. The chief characteristic of such investments is their tendency to create excess plant capacity — a tendency which has been accentuated by improvident expansion programs carried out many decades ago and, more recently, by technological improvements which increase efficiency but which incidentally add to excess capacity. The existence of heavy fixed costs which are largely independent of changes in traffic volume is a disadvantage to rail carriers in that they cannot respond as readily as their competitors to a declining volume of traffic. Optimum utilization of this excess capacity is clearly consistent with the objectives of the national transportation policy, provided that the existence of such excess capacity is not used as a destructive competitive weapon. In the instant proceeding, it is clearly in the public interest and in furtherance of the national transportation policy

to permit the respondents to utilize their excess plant capacity to increase their net revenues; to provide shippers with lower transportation costs; and to preserve defense transportation capacity and facilities for which unregulated trucking offers no adequate substitute.

Secondly, one of the outstanding inherent advantages of rail carriers is their ability to increase the loading of cars substantially with relatively little increase in the cost of moving the heavier loads. In this connection, the Southern's principal cost witness testified that there are at least 10 different methods of allocating constant costs,[14] with the various methods producing widely varying figures on fully distributed cost. Under the Rail Form A method, fully distributed costs are arbitrarily allocated to particular traffic on a ton and ton-mile basis. That accounts for the enormous spread between the Southern's out-of-pocket costs and its fully distributed costs as shown in the following table.

Selected showing of comparisons between fully distributed costs and out-of-pocket costs of Southern Railway System (all-rail movements)

	Costs in cents per ton of 2,000 pounds	
	Out-of-pocket	Fully distributed
From elevators at East St. Louis[1] to—		
Birmingham, Ala	390	711
Selma, Ala	440	802
Palatka, Fla	600	1067
Atlanta, Ga	395	720
Columbus, Ga	479	850
Macon, Ga	438	799

[1] The costs shown do not include the cost of grain shipments originating from elevators on the Terminal Railroad Association of St. Louis at East St. Louis, Ill. Such shipments require one additional interchange. The additional costs involved are 21 cents per ton on a fully distributed cost basis and 15 cents per ton on an out-of-pocket cost basis. These costs are based on 5-car multiple shipments, 80 tons per car, and 20,852 car-mile utilization.

[14]

Method number	Basis
1	Gwt.
2	Cwt.—miles.
3	Car.
4	Car-miles—loaded.
5	Car-miles—loaded and empty.
6	Car length.
7	Depreciated cost of car.
8	Percentage markup on cost.
9	Percentage markdown on revenue.
10	Rail Form "A" method (ton and ton-mile).

Selected showing of comparisons between fully distributed costs and out-of-pocket costs of Southern Railway System (all-rail movements) (Continued)

	Costs in cents per ton of 2,000 pounds	
	Out-of-pocket	Fully distributed
From elevators on the Southern Railway at Evansville, Ind., to—		
Birmingham, Ala	351	617
Selma, Ala	401	707
Palatka, Fla	561	974
Atlanta, Ga	356	626
Columbus, Ga	440	756
Macon, Ga	399	705

The meaning of the figures in the above table is that Rail Form A allocates a much greater proportion of constant costs to heavily loaded cars, such as the "Big John" cars, than to lightly loaded cars. In effect, the comparison of intermodal costs in this proceeding on the basis of fully distributed costs, as thus computed, would mean that the Southern could not act to meet the competition of unregulated truckers with rates which by any rational standard would be highly compensatory to the Southern. In effect, the Southern would be severly penalized for its technological advance while lightly loaded cars would continue to receive only a small allocation of constant costs. If the disposition of this proceeding must be governed by that form of mechanistic analysis, the prospects for rail participation in grain traffic are predictably bleak.

Finally, carriers of general commodities should be accorded every reasonable opportunity to price their services in the light of the different transportation demand characteristics of the numerous articles they are authorized to carry, provided such pricing does not run counter to any of the basic standards of lawfulness in the act. *Cf. All Commodities, New England to Chicago and St. Louis*, 315 I.C.C. 419. Differential pricing should not be inhibited by any obsession about fully distributed costs or by any fear of casting a burden on other traffic where, as here, un-

regulated transportation is the dominant competitive mode. Continued reliance on carrier management to maximize profits by differential pricing, coupled with reasonable regulatory restraints, will result in more efficient use of transportation resources than either unbridled competition or controls that are excessively mechanistic or idealistic in character.

THE ISSUE OF DESTRUCTIVE COMPETITION

As indicated earlier in this report, the Commission has extended to regulated carriers considerable leeway in meeting the competition of private and other carriers not subject to Commission regulation. This is particularly true where such competition has been shown to be clearly dominant with respect to the traffic involved. Thus, the Commission found proposed rail rates designed to meet private water competition to be just and reasonable even though such rates failed to cover all of the costs regarded as out-of-pocket by Rail Form A. *Coal from Southern Mines to Tampa and Sutton, Fla.*, 318 I.C.C. 371.[15] Similarly, in *Canned or Preserved Foodstuffs—Pacific Coast to Gulf*, 314 I.C.C. 569, the Commission, in approving sharply reduced rail rates, noted that the competitive water movement was not subject to its regulatory power. The same leeway has been extended to regulated carriers where proposed reduced rates were designed to meet the competition provided by widespread unlawful trucking operations. *Meats, Fruits, Vegetables—TOFC—Transcontinental*, 316 I.C.C. 585, 593. Numerous other Commission decisions conclude that the minimum reasonable level of rates must be determined in the light of the necessity to meet the competition of carriers who bear none of the burdens of regulation and who are in no position to claim its benefits. Some of the bargeline protestants in this proceeding are regulated in accordance with part III of the Interstate Commerce Act and are entitled to protection against the destructive competitive practices of other regulated modes of transportation.

The huge volume of grain trucked into the Southeast affects the application of another important legal principle. Even before

[15] Specifically, the rates in issue made a small contribution to net revenue but failed to provide the return on equipment and road property which Rail Form A treats as variable in nature.

the enactment of section 15(a)(3) by the Transportation Act of 1958, the Commission recognized that a regulated carrier should not be prevented from meeting the major competition of unregulated carriers in order to protect another mode's minor participation in the traffic. *Soybeans, Pensacola, Fla., to New Orleans, La., for Export*, 293 I.C.C. 634, 638. Since 1958, the Commission has frequently found in cases where private or unregulated transportation is the predominant competitive mode, that the indirect and incidental competitive injury inflicted by reduced rates upon regulated modes falls short of being destructive within the meaning of the act. *E.g., Meats and Packinghouse Products, Midwest to Coast*, 309 I.C.C. 551, 568; *Cement, Wilmington, Mass., to New England, N. J. & N. Y.*, 314 I.C.C. 459, 462.

Finally, in determining whether or not a proposed rate reduction constitutes destructive competition, the Commission has endeavored to ascertain, in the light of all the relevant circumstances, whether or not the respondents' dominant motive was predatory in nature. *Meats, Fruits, Vegetables-TOFC-Transcontinental, supra*, at pages 593-594. Obviously, the Commission is not able to probe the subjective intent of respondents. Nevertheless, the basic purpose of a challenged rate reduction is sometimes indicated by considering whether or not the challenged reduction would have been a rational economic decision even in the absence of competition by the complaining mode. I. and S. Docket No. 7558, *Reduced Transcontinental Lumber Rates, 1961*, 318 I.C.C. 815 (decided February 11, 1963). In view of our finding herein that unregulated trucking is the dominant competitive force, we are satisfied that the Southern was motivated primarily by a desire to meet such competition and that its primary purpose was not to close the Tennessee River to barge transportation of grain.

Regardless of whether or not the injury that would be inflicted on the bargeline protestants is legally justifiable under the circumstances of this case, it might well be serious as a matter of fact. The prior report found that the earnings of barge operators in 1960 from grain "were but 13.42 percent of their total revenue."[16] In view of the tendency of important grain rate

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[16] The figure of 13.42 percent represents the revenue derived from grain by the members of the Waterways Freight Bureau, none of whom are unregulated or proprietary carriers.

adjustments to spread, the possible loss of a substantial portion of traffic accounting for 13 percent of total revenue of one mode is just cause for apprehension. Moreover, the percentage of revenue derived from transporting grain amounts to 26 percent of the total revenue of A. L. Mechling Barge Lines and 27 percent of the revenue of Federal Barge Lines. For two of the carriers operating primarily on the Tennessee River, Arrow Transportation Co. and Igert, the grain revenue percentages are 80 and 51 percent, respectively. If the Interstate Commerce Act proscribes only such rate adjustments as would destroy a mode in one fell swoop, the core of the national transportation policy has no practical purpose or effect.

Upon consideration of the magnitude and the effect of unregulated truck competition, the prior report found it "reasonable to conclude that the rates are proposed to meet such competition." We agree with that finding, recognizing, however, as did the division, that the Southern failed to show that a lesser reduction would not accomplish its declared purpose.

A substantial rate reduction by the Southern has been shown to be justified for various reasons. First, the proposed reduced rates cover a less complete service and reflect economies made possible by the development of the "Big John" hopper car. Secondly, the huge and rapidly growing volume of grain transported by unregulated motor carriers at low and unpublished rates imperatively required some counteraction by rail management. And finally, that management was entitled to expect from the Commission considerable leeway in meeting its primary and unregulated competition. Even so, the lawfulness of a drastic rate reduction cannot be determined in the abstract. At issue here is the lawfulness of a particular level of rail grain rates.

In failing to show that the proposed rate reductions were not substantially lower than the general level of unregulated truck rates and charges, the Southern points out that such charges are difficult to ascertain and are subject to change without notice. That is true. For that reason, as explained by the Southern in its brief, no effort was made to relate the proposed rates to such moving targets. It would be unreasonable to require a carrier to prove with any degree of precision that its proposed rates are not lower than necessary to meet the competition created by unpublished charges subject to change without notice.

If the cost findings made in the prior report were accepted, it would be difficult to approve rates from certain origins to

several of the Tennessee River ports which either undercut the barge rate or unduly narrow the differential on movements as to which the bargelines appear to have the advantage of low cost even on an out-of-pocket basis. For example, from Evansville to Chattanooga the bargeline fully distributed cost is 245 cents; the Southern's out-of-pocket cost (as found by the prior report) is 251 cents; the present barge rate is 248 cents; and the proposed rail rate is 240 cents, or 8 cents below the barge rate. In view of our conclusions with respect to the cost evidence, however, it is unnecessary to determine whether or to what extent a comprehensive rate adjustment, which is adequately compensatory on an overall basis, should be condemned because of the probable harm that would be inflicted by isolated rates. On the basis of the cost evidence hereinafter discussed, we conclude that the proposed rates are below a minimum reasonable level. We further find that if the proposed rates are raised to that level, they will not constitute unfair or destructive competition.

THE SECTION 3(1) VIOLATION

There are merchants and shippers of grain located at the Tennessee River ports who, along with the ports themselves, compete with shippers and other port interests located at the Mississippi and Ohio River crossings. These protestants contend that the proposed reduced rates, as well as those which the Southern has offered to establish from the Tennessee River ports, unduly prejudice them and unduly prefer the Ohio and Mississippi River ports and elevators, merchants, and shippers.

At the outset of this report, it was noted that the proposed rates, as published, apply from the Ohio and Mississippi River crossings to 37 specified destinations in the Southeast. The proposed rates were not published from the Tennessee River ports but can be used under the intermediate application rule. Based on intermediate application, the proposed rates from the Tennessee River ports are considerably higher in relation to the distances involved than the rates from the Mississippi and Ohio River crossings to ultimate destination. In view of this defect the Southern promised to publish rates from the Tennessee River ports constructed on the same formula as the rates proposed from the Ohio and Mississippi River crossings. We are satisfied that the Southern would carry out its promise but we

are convinced that the section 3(1) violation would not thereby be cured.

It was also noted at the beginning of this report that the proposed rates are constructed on a formula which contains a 240-cent minimum. This minimum is operative for distances up to 346 miles. Thus, the minimum would not apply to shipments of grain from the Mississippi and Ohio River crossings to the major markets in the Southeast served by the Tennessee River ports, since those markets are more than 346 miles from the river crossings. On the other hand, the 240-cent minimun under the proposed rates, as promised to be established from the Tennessee River ports, would be the applicable rate to most of the important markets served by those ports. The practical effect of applying the proposed rate formula with its 240-cent minimum to the Tennessee River ports would be to build a Chinese Wall along the south bank of the Tennessee River through which no ex-barge grain could penetrate by rail.

Before a violation of section 3(1) may be found, however, some positive injury or the probable certainty of such injury to one entitled to the protection of that section must be shown. *Cudahy Packing Co. v. Akron, C. & Y. R. Co.*, 318 I.C.C. 229. A number of protestants have shown that such injury reasonably may be expected to result from approval of the proposed rates. In the interest of brevity, the position of protestant Central Soya will be used for purposes of illustration.

Central Soya Company, Inc., is engaged in the business of soybean processing, feed manufacturing, grain merchandising, and related activities. In the Southeast, it owns and operates large plants at Memphis, Chattanooga, and Guntersville. Central Soya, first at Memphis and later at Chattanooga, developed a concentrate to which grain is added to make a complete feed. These concentrates are sold to mixing plants throughout the Southeast. Central Soya's plant facilities at Chattanooga were constructed at great expense in 1955 for the purpose of serving the rapidly growing broiler industry in Alabama, Georgia, and the Carolinas. Its elevator at Chattanooga has a storage capacity of more than 6 million bushels of grain. Chattanooga was selected as a location because of its proximity to the major grain consuming area and the availability of low-cost water transportation. Similar but smaller facilities were established in Guntersville, a mixing plant in 1951 and a 250,000-bushel elevator in 1958.

Considerable grain is processed at the Tennessee River ports but virtually no grain is consumed as such at the ports. Feed processed from grain is not consumed within the port areas. Approval of the multiple-car rates, either as proposed or as promised to be extended, would jeopardize, unduly in our opinion, the investments made in numerous plants and facilities located on the Tennessee River and would tend to confer a corresponding windfall on competitors of the Tennessee River port interests. It is only natural that many receivers and consumers of grain in the Southeast should support the proposed rates by reason of their extremely low level. Nevertheless, it cannot be in their best interest over the long run or in the best interest of the Southeast as a whole to approve prejudicial rates which would jeopardize the value of existing port facilities and encourage the construction of substitute facilities at inland points.

The Southern maintains that elimination of the 240-cent minimum on traffic moving from the Tennessee River ports would make its proposed rate adjustment inadequately compensatory. That appears to be true for the reasons stated by the Southern in its reply to exceptions. The Southern points out in its reply that the transportation costs considered in publishing the proposed rates were based upon a relatively long average haul, but that relatively short-haul rail movements of grain from the Tennessee River ports would produce a different set of transportation costs from the costs developed on the traffic pattern contemplated under the proposed multiple-car rates. One of the principal cost differences arises from the fact that the car utilization figure posited by the proposed rates would be less if the Southern transported grain from the ports. The Southern's costs, as determined in the prior report, are based on the prediction that the "Big John" cars will run about 40,000 miles per car per year, which is more than twice the average mileage made by all of the Southern's cars.

We agree with the Southern that the "Big John" car utilization would be reduced to the extent that such cars were used to haul grain from the Tennessee River ports. We do not agree, however, that a virtual embargo may be imposed on traffic moving from the Tennessee River ports to major markets in order to justify costwise the rates established from the Mississippi and Ohio River crossings. The fact that an increase in rates from the preferred origins may be required to eliminate undue prejudice is obviously not a defense against the removal of prejudice and preference.

No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice. *Mississippi Cotton Seed Crushers Assn.* v. *A., B. & C. R. Co.*, 238 I.C.C. 87, affirmed, 251 I.C.C. 643 (1942).

Finally, the finding of undue preference and prejudice appears to be in accord with the view of the Supreme Court of the United States that no form of rail rate manipulation can be permitted to deprive the shipping and general public of the economies inherent in the water leg of a barge-rail movement. See *Arrow Transp. Co.* v. *Southern Ry. Co.*, 372 U. S. 658, 673 (1963) (dissenting opinion); *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959); affirmed *per curiam sub nom.*, *State Corporation Commission* v. *Arrow Transp. Co.*, 361 U. S. 353 (1960).

In requiring the respondents to remove all taint of discrimination from the rates to be applied from the Tennessee River ports to the destination territory involved, we do not wish to leave the impression that competition via the barge-rail routes will not be difficult. On the contrary, the all-rail rates, even though increased by the amount hereinafter indicated, will be lower than the barge-rail rates to numerous inland points, even though the proposed rates, as thus increased, are applied on an equitably related basis from the Tennessee River ports. This is because the 89-cent transfer charge from barge to elevator is such a large percentage of the all-rail rate that this inherent disadvantage of barge-rail service cannot easily be overcome. For obvious reasons the respondents should not be required to absorb all or part of those transfer charges by hauling grain from the port cities at little or no charge.

However, if the artificial rate barrier created by the 240-cent minimum is removed and reasonably related rates established on ex-barge traffic, the competitive difficulties encountered by the bargelines and the Tennessee River port interests should not prove to be insuperable. For example, barge-rail rates and charges may be reduced in one or more of the following ways: (1) present transfer charges, now 89 cents, may be reduced to 75 cents, the generally recognized cost of providing the service, and to 50 cents to the extent that grain can be transferred direct from barge to

rail car; (2) present barge rates, to the extent now above fully distributed costs, may be reduced without any resulting hardship; (3) bargelines may freely reduce their rates on bulk movements of grain to any level which the economics of the situation may justify; and (4) bargelines may effect further economies in their operations through technological improvements and by other means. In addition, barge-rail grain originating at river ports north of St. Louis may still be able to compete readily with grain shipped by rail or by truck to the Ohio and Mississippi River crossings and thence all-rail to destinations in the Southeast.

In suggesting the elimination of the 240-cent minimum in order to correct the undue preference and prejudice found to exist, we do not mean to imply that this is the only method that would be acceptable. The respondents may employ any means of correction they choose, provided that rail rates from the Tennessee River ports are no less favorable to shippers located thereat than the all-rail rates available to shippers at the Ohio and Mississippi River crossings who compete in common markets in the Southeast.

THE PROPOSED RATES OF THE LOUISVILLE & NASHVILLE AND OTHERS

In the prior report the rates proposed by rail respondents other than the Southern were found not shown to be just and reasonable. This conclusion was based primarily on the fact that these respondents presented no evidence showing that the 450-ton rates, 50 tons per car in conventional equipment rather than 90 tons per car as proposed by the Southern, would be adequately compensatory. The proposed rates of the Louisville & Nashville and others violate section 3(1) for the same reasons and to the same extent as those proposed by the Southern.

If the rates proposed by the Louisville & Nashville and others are modified so as to eliminate the section 3(1) violation, there are compelling reasons for permitting those respondents to participate in the traffic along with the Southern. At the close of the hearing the Louisville & Nashville and the Seaboard had each ordered 100 covered hopper cars of 90 tons' capacity for delivery in 1962. Even in conventional equipment, however, there are a number of important movements on which the ton-mile revenue of the Louisville & Nashville from its 450-ton rates would exceed the Southern's because the shorter direct routes of the former offset the economies derived by the latter from its "Big John" cars. That fact is demonstrated by the table below on movements from St. Louis and East St. Louis to the destinations indicated.

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To—	Route	Route miles	Revenue per ton-mile
			mills
Atlanta	Louisville & Nashville	600	6.4
Do	Southern	735	5.3
Birmingham	Louisville & Nashville	820	6.0
Do	Southern	728	4.3
Chattanooga	Louisville & Nashville	497	6.6
Do	Southern	582	5.3
Gainesville	Louisville & Nashville	714	5.8
Do	Southern	783	5.3
Macon	Louisville & Nashville	703	6.3
Do	Southern	829	5.3
Palatka	Louisville & Nashville	1,012	5.7
Do	Southern	1,115	5.2
Perry	Louisville & Nashville	888	5.8
Do	Southern	1,033	5.0

As indicated in appendix C, if the proposed rates are increased by the amount required to justify approval thereof for the Southern, the same rates for the Lousiville & Nashville and others would appear, in general, to exceed their out-of-pocket costs for moving the grain in boxcars. If return on investment is eliminated from the out-of-pocket costs of the Louisville & Nashville and others, the rates, as increased, would generally appear to exceed the adjusted out-of-pocket costs for the covered hopper cars. Under the circumstances, we believe that it is proper to eliminate such return. *Cf. Coal from Southern Mines to Tampa and Sutton, Fla.*, 318 I.C.C. 371.

Approval of multiple-car rates for the Louisville & Nashville and others will have the salutary effect of preventing widespread discrimination among shippers and receivers of grain in the Southeast. Numerous shippers and receivers of grain are served by the Louisville & Nashville and others but not by the Southern. Even though the Louisville & Nashville and others will no doubt equip themselves eventually with a fleet of jumbo hopper cars, the temporary hardship inflicted upon shippers and receivers of grain located only on the lines of the Louisville & Nashville and others by treating those carriers less favorably than the Southern would be severe and difficult to justify even on a temporary basis.

In dealing with broad territorial rate adjustments on grain and coal, the Commission has recognized the extreme sensitivity of these commodities to even slight changes in transportation charges. Accordingly, the Commission has generally refused to approve

such adjustments on a piecemeal basis. For example, in *General Commodity Rate Increases, 1937*, 223 I.C.C. 657, the Commission felt constrained to approve increases on coal and coke, notwithstanding its conclusion that increases for the Pocahontas lines would "shock the conscience." It seems even more important in the instant proceeding, in view of the drastic nature of the reduction, not to shatter the competitive balance among carriers, shippers, and receivers of grain in the Southeast. The grain rate structure may be crumbling but it still possesses many of the characteristics of a huge blanket in which a tug at one end is felt at the farthest extremities. So long as such characteristics exist, it is necessary to temper for shippers and receivers of grain the disruption of marketing practices and patterns which partial economic regulation of transportation appears to make inevitable.

It was suggested in the prior report that approval of the 450-ton rates for the Louisville & Nashville and others on the same basis as for the Southern "would nullify to a large extent the Southern's great expenditures for the more efficient and economical jumbo cars ***." We do not agree. If there are significant economies to be derived from the use of the "Big John" cars, and we believe there are, such economies will be derived by the Southern and not by carriers who failed to exercise comparable ingenuity and foresight. That observation is not applicable, however, to the single-car rates of the Louisville & Nashville and others which are 120 percent of the proposed multiple-car rates and which were permitted to become effective without suspension and investigation. Whether or not the Louisville & Nashville and others gain an unfair advantage by reason of having single-car rates with a 50-ton minimum, as opposed to the Southern's 90-ton minimum, will be considered in connection with the investigation upon our own motion into the lawfulness of all the related single-car rates now in effect. In the interest of according equal treatment to the Southern and the other rail respondents, the finding in the prior report requiring the Southern to cancel item 200 authorizing substitution of boxcars is reversed.

THE SINGLE-CAR RATES

Subject to the provisions of section 7(d) of the Administrative Procedure Act, we take official notice of the following facts:[17]

[17] We are also cognizant of the fact that effective June 24, 1968, the Southern made its multiple-car rates effective specifically from Chattanooga.

Effective February 28, 1963, and later, all respondents established point-to-point single-car rates based on 120 percent of the multiple-car rates. Like the multiple-car rates, these single-car rates are local to each respondent, and apply from the same origins, including the Tennessee River ports, to the same destinations (as well as others) subject to the same restrictive rules applicable to multiple-car rates. Effective May 24, 1963, railroads other than the Southern supplanted the specific point-to-point single-car rates with a scale of rates reflecting generally 120 percent of the multiple-car basis to apply between all points in southern territory. A few departures from the formula are made by the grouping of origins, and applying the rate to a more distant point as maximum at intermediate points. To illustrate, Cairo and Metropolis, Ill., take the rates from Evansville to certain points in Alabama, Georgia, and Florida; from St. Louis, Memphis, and Evansville, the rate to Columbia, S. C., applies to the intermediate point of Augusta, Ga. Unlike the point-to-point rates, the expanded scale rates are subject to minima of 90 tons in covered hopper cars and 50 tons in other cars and include switching absorption, and routing is open except for Southern Railway system lines. Neither single-car basis was suspended but the scale rates were placed under investigation in No. 34271, Grain within Southern Territory. The minimum rate on single cars is 288 cents.

Although the lawfulness of the single-car rates mentioned above is not in issue in this proceeding, it is obvious that those rates, which are subject to a minimum of 288 cents, are subject to the same criticism under section 3(1) of the act as the multiple-car rates with a minimum of 240 cents. Therefore, we are, on our own motion, placing under investigation those single-car rates which became effective on February 28, 1963, and they will be considered jointly with those rates placed under investigation in docket No. 34271.

CAR UTILIZATION

As was pointed out in the prior report, the degree of utilization of rail cars has a direct and substantial effect on the costs of providing rail service. A controversial issue is the utilization in annual mileage that may reasonably be expected in using the Southern's jumbo cars to haul grain in multiple-car shipments, and the car expenses that might be associated therewith. The prior report found that on the question of car utilization of the

jumbo covered hopper cars that a utilization of 40,000 car-miles annually would be used in arriving at a restatement of jumbo car costs. It was pointed out that freight train car cost determinations are sufficiently complicated when there is available sound historical data but that in the present proceeding, the problem is acute because the Southern is proposing a relatively new service in new high investment, large capacity equipment on which no significant or dependable experience has been gained either as to future car utilization or the car expenses that might be associated with such utilization.

The prior report, after admitting the lack of reliable data on this point, relied on operating and engineering judgments to arrive at the utilization figure of 40,000 car-miles annually. Since the car utilization question presents a series of interdependents consisting of car utilization, volume, attractive rates, and costs, any change in these interdependent aspects can mean a change in the car utilization figure.

In view of division 2's finding that the rates of the Louisville & Nashville and other respondents other than the Southern were not shown to be just and reasonable, it was not necessary for the division to decide what effect the approval of the other respondents' rates would have on the Southern's car utilization figure of 40,000 car-miles annually as we must here. The finding made herein that the rates out of the ports should be related to the rates from the origin points will also affect the car utilization figure because of the greater use of the jumbo cars on the short-haul traffic out of the ports with a resultant lessening of the jumbo car-miles utilized. We believe that these changes call for our judgment that a car utilization figure of 20,852 miles per year, the same as for existing covered hopper cars, is a more accurate car utilization figure than the 40,000 car-mile figure used in the prior report. A more accurate figure is not available without further actual data acquired after extended use. Appendix B attached hereto contains our restatement of the Southern's out-of-pocket costs at the proposed minimum weight of 450 tons based on a car utilization figure of 20,852 car-miles and a comparison of such costs with the proposed rates.

Additionally, it is believed that the prior report, in using the 40,000 car-mile figure, failed to give sufficient consideration to the fact that so-called nonapplicable items of maintenance expenses have already been excluded in developing the associated car maintenance expense. As pointed out by protestants, this has the

effect, when considering the common elements of maintenance expenses, of saying that the jumbo cars will cost only 40 percent as much per car-mile to maintain.

The use of 20,852 car-miles as the yearly utilization figure of these jumbo cars results in the rates of the Southern on an overall basis meeting only 102 percent of out-of-pocket costs for 450-ton movements. In order for the Southern rates to produce what we find to be a minimum reasonable return, 118 percent of out-of-pocket costs, the Southern must increase its overall level of rates to produce at least that percentage relationship. In this connection, it should be noted (1) that division 2 approved the Southern's rates in the prior report in the belief that they would return 118 percent of out-of-pocket costs; (2) that the Southern itself would regard its proposed rate adjustment as inadequately compensatory on the basis of our restatement of its costs; and (3) that the proposed rates, even though increased by an average of 16 percent, will still fail to recover the Southern's out-of-pocket costs for some of the movements to points in Georgia and Alabama. See appendix B. In requiring the Southern to increase the proposed rates to produce a return of not less than 118 percent of out-of-pocket costs, such costs shall be computed in accordance with the restatement of the Southern's out-of-pocket costs in the prior report, except that 20,852 car-miles must be used as the yearly utilization figure.

SUMMARY

It would be technically correct, but nevertheless misleading, to summarize the effect of this report as requiring an increase of approximately 16 percent in the multiple-car rates presently in effect. Actually, the Commission has indicated its approval of a broad territorial grain rate adjustment at a level approximately 53 percent lower than the preexisting level. An upward revision of the proposed adjustment by 16 percent: (1) will preserve for the bargelines the cost advantages they enjoy with respect to certain port-to-port movements; (2) will prevent the transportation of grain by rail at rates which the record indicates would not be adequately compensatory if established on a nondiscriminatory basis from the Tennessee River ports; and (3) will enable the Commission, the carriers, and the other affected interests to determine more clearly, in the light of actual experience, whether a further rail rate reduction is required to meet unregulated truck competition

and can be justified costwise, whether such competition can be overcome on a somewhat higher level of rates, and whether the effect on grain processors and shippers is such as to warrant modification of extension of the reduced rates to meet the needs of the grain trade.

In conclusion, it is important to bear in mind that major and competitively inspired rate adjustments may entail consequences that cannot always be foreseen and that such adjustments cannot be regarded as permanent in nature. It is the Commission's intention, therefore, to follow closely the actual impact of the proposed rates on the basis herein approved, and to take whatever effective action is not precluded by the inequality of competitive opportunity sanctioned by law. To that end, the rail respondents are hereby ordered and directed to keep car utilization records on the jumbo cars, including loaded and empty car-miles and the average count of the cars, so that after a sufficient period of actual use, we will be able to call on the respondents for a more accurate presentation of their experience with these cars. Both figures shall be for a year following the effective date of the rates.

FINDINGS

Upon reconsideration, we find the proposed multiple-car rates, minimum 450 tons per shipment not shown to be just and reasonable or otherwise lawful. The proposed schedules are ordered canceled and the proceeding discontinued, without prejudice to the filing of new schedules in conformity with the conclusions reached herein.

An investigation will be instituted into the lawfulness of the related single-car rates effective February 28, 1963, and later, reflecting 120 percent of the multiple-car rates.

Appropriate orders will be entered.

VICE CHAIRMAN GOFF, dissenting:

Upon further consideration, I must concur in the conclusions reached in regard to public costs. I cannot, however, agree with the ultimate findings of the majority.

The Southern's overall multiple-car adjustment, minimum 450 tons, is compensatory, even using the car-utilization factor of 20,852 miles, as to which I do not necessarily agree. Also, the facts of record, the provisions of section 15a(3) of the Interstate

Commerce Act, and the decision of the Supreme Court in *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744, preclude, in my opinion, the majority's view that the Southern's multiple-car rates are destructively competitive in violation of the national transportation policy. Further, the circumstances and conditions surrounding the transportation of grain from Tennessee River ports differ so substantially from the transportation of grain from Ohio and Mississippi River points as not to warrant the finding that the Southern's rates from the latter result in undue preference and prejudice in violation of section 3(1). In the light of the above, I would find that the Southern's multiple-car rates, minimum 450 tons, are just and reasonable and otherwise lawful.

I recognize the burden which will be placed on receivers of grain located solely on the lines of respondents other than the Southern, resulting from approval of the Southern's multiple-car rates and disapproval of those of the Louisville & Nashville and others. Nevertheless, it has not been established that the latters' proposed multiple-car adjustment is compensatory. Under the circumstances, I must conclude that such rates are not shown to be just and reasonable and otherwise lawful. Such a conclusion does not preclude the Louisville & Nashville and others from filing rates comparable to those of the Southern, subject to the 450-ton minimum, 90 tons per car, to cover transportation in jumbo cars, or other multiple-car rates, subject to lower minima per car, which may be compensatory.

Accordingly, I would affirm the ultimate findings in the report of division 2.

COMMISSIONER FREAS, dissenting:

My views are set forth in the prior report which I would affirm. However, subsequent expressions by petitioners and by my colleagues necessitate further comment.

PUBLIC COSTS

The prior report did not turn on the basis of inherent advantage, either with or without consideration of "public costs." It turned, as the majority recognizes, on the aspect of the unregulated truck competition to be met. Nevertheless, the "public costs" issue, having been developed in detail, necessarily had to be evaluated.

Because of vigorously asserted contentions that the Commission was usurping powers of the Congress, it is important to re-emphasize that the prior report contained no suggestion that "public costs" be included in the determination of the intrinsic reasonableness of rates. Whether the beneficiaries of governmental largess should pay for them is for the Congress to decide. But that is not the problem before us. The problem is whether, where one mode asserts the inherent advantage of low cost in performing a service, total costs necessarily incurred in the transportation should be considered for all or only for some of the competing modes.

The water carrier protestants assert that it is inherently cheaper for them to transport grain than it is for the rail carriers, but most assuredly the protestants could not even navigate certain of the rivers had not the involved improvements and maintenance taken place.

Obviously, to the extent the improvements and maintenance are paid for out of the public treasury, protestants do not incur the expense thereof. But in weighing the relative economy of different services, it is the cost of providing them that should be considered. It is elementary that the most economical mode is that mode which uses up the minimum of resources, whether of materials or of manpower, and regardless of who provides them. In other words, true economic costs reflect the consumption of resources; they are not reduced by the amounts supplied by the general taxpayer. Protestants' asserted cost advantage is thus not inherent; it is not brought about by their own efficiencies. At the very most it is artificial; and in plain economic fact it is essentially illusory, for it represents nothing more than a transfer of costs from the user to the taxpayer. This illusion is the "phantom" we face. In competitive situations directly involving railroads and bargelines these public improvements are factors of vital and crucial economic impact. See *Proposed Lake Erie–Ohio River Canal*, 235 I.C.C. 753. Most assuredly they are not hypothetical. They are so relevant an element of cost that we may not proceed oblivious to them. *Cf. United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 554 (1946), as to condemnation proceedings. The Supreme Court has clearly indicated that the appropriate method of deciding which of two competing modes has the cost advantage on a given movement should be left for initial resolution to the Commission's informed judgment. *Interstate Commerce Commission v. New York, N.H. & H.R. Co.*, *supra*, at pages 760-61

(1963). Certainly, it is no usurpation of congressional power to say that in providing for fair competition under the mandate of the national transportation policy[18] the true cost of providing a given service is properly the necessary criterion by which to judge a contention of cost advantage. To avoid an allocation of "public costs" in these circumstances has the effect of "umbrella" rate-making in its most blatant form, an effect which I cannot believe the national transportation policy or the act permits. *Cf. Interstate Commerce Commission* v. *New York, N. H. & H. R. Co., supra.* It is not our function to find economic advantages where none exist. If a water carrier is to be subsidized, additional pricing restrictions as to a rail competitor seem most unfair. *Cf.* Sargent, *British Transport Policy* 148-49 (1958). The Commission is no longer the "giant handicapper." 372 U.S. at page 758.

Nor does the absence of past Commission consideration of "public costs" in formal proceedings provide a reason for ignoring them here. Under conditions obtaining during most of the Commission's history the determination of the low-cost mode was not considered important. The "public cost" question has not heretofore been resolved because it was not heretofore presented in a formal rate proceeding, nor until recent times was there any need for resolving it. The Commission has in the past, however, recognized that "railroads weakened by public provision of facilities for their competitors cannot respond as fully as they should to the needs of the public for efficient and safe transportation." *Proposed Lake Erie–Ohio River Canal, supra,* at pages 792-93.

This is not a tract for user charges, although the majority insists on drawing a parallel.[19] Rather, it is an effort to insure, as a fairness we must, valid and comparable cost comparisons in intermode rate situations where one mode asserts the inherent advantage of low cost. The national transportation policy speaks of fair and impartial regulation; it precludes a discriminatory double standard. The stark fact is that failure to take account of "public costs" can place one mode of transportation at a distinct

[18] "to promote * * * economical, and efficient service and foster sound economic conditions in transportation and among the several carriers."

[19] Thus it states: "Assignment of 'public costs' to the cost structure of bargelines assumes that such carriers, for the purpose of determining their inherent advantages, ought to pay user charges or tolls in an amount sufficient to defray their share of the total cost of waterway development and maintenance." The theory of the prior report, in which I fully believe, was that who "ought to pay" was for the Congress to decide, but that where the advantage of low cost lay was a determination reposed in the Commission by clear congressional mandate.

competitive disadvantage. Equal treatment, the very touchstone of congressional intent, should prevail. Otherwise, the result, as here, is plain: there is a diversion of traffic that is simply not based on actual differences in transportation costs. Accepting these premises, as I do, the alleged difficulties in arriving at appropriate computations in particular cases are of little moment. When conclusions are based on cost the entire cost must be taken into account. *Cf. Northern Pac Ry. Co. v. North Dakota*, 236 U.S. 585, 597 (1915).[20] Careful studies would provide results as reasonably accurate and convincing as any other cost determination. Indeed, almost every problem discussed in *Public Aids to Domestic Transportation*, *supra*, is presently taken into consideration in usual cost-finding application. As to the cost of waterway improvements for navigational purposes, resort can be had, for example, to available governmental figures, commencing with the estimates of navigational costs required when such public works appropriations are being considered by Congress. See *Task Force Report on Water Resources and Power*, prepared by the Commission on Organization of the Executive Branch of the Government, 46, 47 (Vol. 1, June 1955). There are also methods for allocating multipurpose waterway costs among functions. See *Proposed Practices for Economic Analysis of River Basin Projects*, Report to the Federal Inter-Agency River Basin Committee prepared by the Subcommittee on Benefits and Costs, 53-57 (May 1950); *Task Force Report on Water Resources and Power*, *supra*, at 104-10. As stated, the basic navigation improvement data are available and can be utilized. *Cf. Proposed Lake Erie–Ohio River Canal*, *supra*. That they merit inclusion seems beyond question. *Task Force Report on Water Resources and Power*, *supra* at 121. Even a further refinement of the data introduced by the Southern could suffice. The reasons for protestants' and interveners' reluctance are understandable; those of the majority are unconvincing.

LEVEL OF RATES

The rate increase is said to be required to "preserve for the bargelines the cost advantages they enjoy with respect to certain port-to-port movements," to "prevent the transportation of grain by rail at rates which the record indicates would not be adequately

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[20] At this point, I reaffirm my disagreement with *Iron or Steel Scrap from Conn., Mass., and R. I. to Pa.*, 318 I.C.C. 387.

compensatory if established on a nondiscriminatory basis from the Tennessee River ports," and to "enable the Commission, the carriers, and other affected interests to determine more clearly, in the light of actual experience, whether a further rail rate reduction is required to meet unregulated truck competition and can be justified costwise, whether such competition can be overcome on a somewhat higher level of rates, and whether the effect on grain processors and shippers is such as to warrant modification or extension of the reduced rates to meet the needs of the grain trade."

The division's report turned on the need to meet truck competition. That this competition exists, is substantial, and is justification for reducing rates, the majority seems to recognize. It is appropriate, then to review the above reasons and such others as appear for the mandatory increase, against this background.

Rates published to meet substantial long-haul truck competition may be condemned on various grounds but not, at least in the absence of circumstances not present on this record, to insure the continued participation in traffic by a third mode of carriage, particularly when that mode by its own admission does not face such competition. To condemn them for this reason seems clearly to be "holding an umbrella" over one mode of transportation—something we say we do not do. Moreover, the preservation for the bargelines of their asserted cost advantage by the 16-percent increase narrowly isolates the instant situation and converts it into an ordinary rail versus water proceeding, which it is not.

It would appear that the majority's ultimate findings rest solely on its 20,852 car-mile utilization figure, a figure I believe is patently unsound. Can it really be believed that the involved equipment, requiring less maintenance, less switching, and no transit, and developed for long-haul through volume traffic solely on respondent's lines, would result in a figure the same as that applicable to conventional equipment utilized on and off owning lines? I think not. Indeed, the Southern's proposal here would lessen the persistent car supply problem plaguing the rail carriers, particularly the grain lines. Respondent Southern's car utilization figures were based on actual experience, and were properly projected in special studies. It was demonstrated, and the division report so noted, that this equipment accrued greater mileage and hauled greater tonnage in the 2-year period

since their acquisition than did conventional equipment in 10 or 15 years, or in 15 to 20 years, respectively. Actually, the division's 40,000 car-mile figure constituted a very conservative judgment, and there is some support for respondent's 60,000-mile figure. In any event, the use of either 40,000 or 60,000 car-miles would place the inherent cost advantage with respondent utilizing the basis of the majority. As to that basis, it is indicated that it will be utilized only in situations such as that obtaining herein. Supposedly, fully distributed costs, although attacked with great emphasis, would otherwise continue to prevail somehow as the guideline in intermode cases.[21] Thus, the majority finds destructive competition as to the effect of respondent's actions upon the bargelines. In this regard, comparison is made between the proposed multiple-car rates which do not include the costly fringe benefits of transit, the usual demurrage, et cetera, on the one hand, and the conventional single-car rates with those features, on the other. Plainly, this is a comparison of unlike services.[22] Nor can I agree with the weight given to the percentages of revenue from grain derived by protestant water carriers.[23] I am not persuaded that the fears of the majority will be realized.

[21] While one may challenge the various methods of computing out-of-pocket and fully distributed costs, there is, in my opinion, no sound justification whatsoever from an economic standpoint for applying different standards in determining where an asserted low-cost advantage lies. Fully distributed costs have heretofore been the consistent criterion, and I adhere to that position for the reasons stated in my 1958 testimony to the Senate cited by the majority. Here, however, the overwhelming competition is from unregulated motor carriers, none of whom appeared and asserted a low-cost advantage.

[22] It is noted that the division's conclusion that the fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate is not questioned, as such, by the majority.

[23] The record discloses that more than 75 percent of the grain tonnage transported by protestant Waterways Freight Bureau's 18 members did not move to Tennessee River ports. About 70 percent of grain handled by Aiple Towing Co., and 85 percent handled by Upper Mississippi Towing Corp., likewise moved to ports not on the Tennessee River. In 1961, of the total grain tonnage handled by Mechling Barge Lines, Inc., of over 927,000 tons, only 52,439 tons, or less than 6 percent of that grain, was delivered by that carrier to Tennessee River ports. During 1960, of the 31 barges of grain handled by Igert, Inc., 18 were towed to Tennessee River ports. Forty-six percent of Arrow's grain tonnage was transported to Tennessee River ports. American Waterways Operators, Inc., produced no comparable figures on the grain traffic of their carrier members. The evidence also shows that grain is processed at Tennessee River ports and at least one feed miller and grain merchandiser testified it has been shipping and will continue to ship grain to its plant at Guntersville (not served by the Southern). Two large waterside flour mills at Chattanooga, one of which was recently constructed, are designed to handle barge grain and it is reasonable to assume because of the large financial outlay that they intend to continue the use of barge grain. Tonnage for 1960 of bargeline members of the Waterways Freight Bureau is shown to be 10.94 percent whole grain and soybeans and 89.06 percent other commodities, the latter, in order of importance, being coal, iron and steel, grain, sulphur, petroleum products, chemicals, sugar, phosphate rock, aluminum ore, and others.

Assuming that the proposed rates are necessary to capture some of the four to six million or more tons hauled by unregulated trucks, I do not understand that their possible incidental effect upon another mode makes them legally unfair or destructive of the latter mode. The majority, however, is unwilling to make the aforementioned assumption. Instead, since the level of the truck rates is unknown, the majority falls back on that as basis for what seem to me to be equivocal conclusions. Surely, the carriers and the public are entitled to something more. In testimony to Congress and in numerous speeches we have forcefully called attention to the loss of regulated carrier revenue to the unregulated carriers. Here, we have a strong evidentiary record spelling out the extent of the long-distance backhaul traffic. The record establishes, at the very least, that such traffic is shipped at charges which have caused it to move by truck rather than by rail, which can be and are changed to suity any given situation, and which, in certain instances, are said to approximate gasoline money. On this record there is no basis for concluding that respondent Southern, after lengthy and careful evaluation of the problem, would forego any additional revenue it might realize at somewhat higher level of rates if it believed such truck traffic could be obtained thereat. After all, the equipment is expensive. Stated otherwise, it is extremely unlikely that the report's higher level of rates will attract the sought truck traffic.

Consideration will now be given to the other reasons advanced in justification of the required increase. Assuming that certain of the Southern's rates (mainly from St. Louis and Evansville to Alabama and Georgia) and the rates that would apply if the same basis (without the $2.40 minimum) were made to apply from Tennessee River ports are too low, is this justification for increasing the entire body of rates 16 percent? Many of the Southern's rates now and without any increase exceed out-of-pocket costs by more than four times the amount of almost half of those from St. Louis and Evansville to Alabama and Georgia after the increase the majority finds necessary to make them lawful. Similarly, many rates, before the required increased, exceed costs by much more than those to be published from Tennessee River ports.

In any event, the increase required to bring the St. Louis and Evansville to Alabama and Georgia rates that are below out-of-pocket costs to that level averages 8.2 percent. Most of the rates from the Mississippi and Ohio River ports are above costs, many by substantial amounts; the maximum deficit is

14.6 percent. *Baltimore & Ohio R. Co. v. United States*, 345 U. S. 146 (1953), is authority for the proposition that in a broad adjustment such as the one here each and every rate need not return something above out-of-pocket costs so long as on an overall basis the rates in the adjustment are compensatory. Nor do I see the logic of requiring an increase in the entire body of rates to preclude the movement of any traffic at rates below the Southern's out-of-pocket costs when most of them not only now meet that test but, in fact, exceed it by substantial amounts, and when to require this increase defeats the purpose of the entire proposal; i.e., to meet unregulated truck competition.

The foregoing discussion regarding the relation of rates to out-of-pocket costs is based on the 40,000 car-mile utilization employed by the division, which for reasons indicated, I regard to be proper. But even on the basis of the 20,852-mile utilization adopted by the majority, the incongruity is there although in lesser degree.

CANCELLATION OF ITEM 200

The conclusion of the report that the rates, as increased, would be just and reasonable when applied to the transportation of grain in ordinary boxcars changes the thrust of the Southern's proposal. It proposed reduced rates to pass along to the shippers the saving made possible by the introduction of the "Big John" cars and thereby to regain traffic diverted to unregulated trucking. Not to confine the proposed rates to transportation in such equipment, as did the division report, undermines, without warrant, the rational of the proposal.

RATES OF RESPONDENTS OTHER THAN THE SOUTHERN

The record fails to show whether or not the rates of the other respondents, with the 16-present increase, would be compensatory. The comparisons of their ton-mile revenue with that of the Southern do not suffice. It is not shown how such revenues compare with the costs. In addition, since I view the 16-percent increase as unjustified and would approve the Southern's rates as proposed, consideration must also be given to the rates of the other respondents as proposed. Because of equipment limitations, respondents other than Southern would haul their grain in lots a little over half the size of the Southern's shipments. For this reason their

costs are substantially higher than those of the Southern. This is so regardless of which of the costs of record we use. It is also so regardless of whether we include return on investment and certain taxes, as we generally do, or exclude them, as we have in isolated instances.[24]

The rates of these other respondents should stand on their own bottom. As indicated, because of those respondents' higher costs due to their inability to transport 90 tons in single cars, their proposed rates are not compensatory; protestants' showing to this effect has not been rebutted. In my opinion, neither the proposed rates nor those as increased can be approved merely to put those respondents in the position they would enjoy had they acquired larger cars. Here, an excerpt from the Commission's testimony on H. R. 4700 and H. R. 4701 before the House Interstate and Foreign Commerce Committee on June 4, 1963, is in point: "If a carrier is to invest heavily in innovations to reduce its costs and hence its rates only to have a competitor, without such justification, able freely to meet or defeat its new rates, it would seem to us to deter initiative and ingenuity—placing a premium on sitting back to let the other fellow do it." If respondents other than the Southern choose to participate in multiple-car traffic, they need only, as the prior report indicated, utilize jumbo cars, under like conditions when their rates are otherwise justified. Not only would these respondents be in no better a revenue position under the proposed rates with the traffic than without it, but their revenue position would be directly and substantially worsened. Moreover, the Southern, which is in a position to handle the traffic at a profit because of the cost and operational advantages of its extra-large hoppers, would be faced with unwarranted rail competition geared to deprive it substantially of that advantage. Such a result is not in keeping with any mandate of the national transportation policy or any section of the act. Nor can the single-car rates presently in effect of all respondents determine the reasonableness here of the multiple-car rates of respondents other than the Southern. The single-car rates are 20 percent higher than those at issue here.

The majority expresses concern for the shippers and consignees located on the lines of respondents other than the Southern.

[24] In this regard it is observed that return on investment has never been eliminated in the past as to regulated carriers meeting competition impelled by another such carrier of the same mode. In reality, such competition is the sole basis for the action here of respondents other than the Southern.

While their interests are most certainly to be considered, they would best be served by a sound transportation system, and not by rates on which the carriers stand to lose substantial sums. Approval of the Southern's rates results in no legal injury to those shippers or consignees. Competitive rates of a regulated rail carrier can have no more adverse effect upon them than the unregulated rates the existing carrier proposes to meet.

THE SECTION 3(1) VIOLATION

The majority accepts the protestants' contention that the proposed rates and those which respondent Southern offered to establish upon request would violate section 3(1) by unduly preferring the Ohio and Mississippi River ports, elevators, merchants, and shipping interests and unduly prejudicing similar interests on the Tennessee River. However, the proposed rates were published to meet the overwhelming long-haul truck competition clearly demonstrated on the record.[25] There is nothing to show that similar long-haul truck movements exist in relation to the Tennessee River ports. Indeed, protestants Arrow and Federal disclaim the existence of such competition. In fact, the record establishes that truck movements in relation to those ports are shorter and one-way. On the other hand, respondent Southern is attempting to meet long-haul grain movements in which the trucker also moves a load in the return direction. It is thus clear that the transportation circumstances surrounding the compared movements are patently and fundamentally dissimilar. This being so, there can be no undue preference or prejudice within the meaning of section 3(1). Moreover, by overlooking these significant and demonstrated differences in conditions the majority is gravely inconsistent. Either respondent Southern is to meet its largest competition at compensatory rates or it is not. If long-haul trucking is the decisive factor, it cannot be fractionalized by ignoring it under section 3(1) while recognizing it elsewhere.

The majority states that "It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice."

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[25] Surely the meeting of such competition is a legitimate commercial objective, even in those limited instances where the rates do not quite meet out-of-pocket costs. *United States v. National Dairy Co.*, 372 U. S. 29, 36-37 (1963), under the Robinson-Patman Act, *Baltimore & Ohio R. Co. v. United States*, supra.

But this begs the question. When does meeting competition in some instances and not in others create undue preference and prejudice? As indicated, it is equally well settled that it does so only if the attending circumstances and conditions are similar. If cost considerations make it profitable to meet long-haul competition but unprofitable to meet short-haul competition on the same basis, conditions are not similar. Although situations vary with particular circumstances, it is generally conceded that trucks have an advantage in short-haul transportation while rails' comparable area of advantage is in the long-haul field. We have urged carriers to concentrate on that traffic for which they are best fitted. The evidence shows that in spite of material reductions in the course grain scale in 1957 and 1959 in the South and publication of even lower specific commodity rates from Chattanooga to 72 destinations in Georgia, the Carolinas, and Florida, the grain continued to move by truck. The multiple-car rates meet the conventional single-car rates at about 100 miles from Chattanooga. The record demonstrates that the grain moves from Chattanooga almost exclusively by unregulated truck for 100 miles and less. While the multiple-car rail rates from Chattanooga are not related, distance considered, to the proposed rates from Ohio and Mississippi River crossings involved to the same destinations, this situation has always existed. Where, as here, respondents have adequate justification to change the present rate structure to reflect mileage, such action does not constitute a violation of section 3. *Liquefied Petroleum Gas in Jumbo Tank Cars — S. W. F. B.*, 319 I.C.C. 31.

The imposition of minima is as old as Commission regulation. From the beginning of regulation, minima have been maintained without question in this regard. Under minimum charges per shipment or per car, the one who is so situated that the minimum operates against his shipment pays more per unit than the one beyond its impact. That the volume of a minimum might be questioned is understandable, but that the principle should be condemned is not.

The Southern has offered to any origin on its lines equal treatment on the same scale basis, constructed to meet long-haul truck competition, as is accorded to the proposed origins. Protestants, however, would not have it so, and the majority would remove the 240-cent minimum in favor of the establishment of rates reasonably related to the increased proposed rates. The result of such rates would be all too obvious. Respondent

Southern would obtain little, if any, additional long-haul traffic from the trucks. Instead, even much of its existing traffic would undoubtedly be diverted to barge-rail movements as to which there is strong reason to believe that the rail factor would be non-compensatory. I cannot support a result which would tender the fruits of the Southern's efforts to the benefit of a competing mode.

As indicated, the majority's action prevents the Southern from meeting long-haul truck competition to the extent it deems necessary. Without a doubt, and the tenor of the majority's discussion so indicates, such action will directly benefit the water carriers,[26] although section 3(1), on its face, is not to be applied to any disadvantages that they may suffer. In effect, the majority would find a section 3(4) violation under section 3(1). Suffice it to say that there can be no section 3(4) finding in the very nature of things if only because the Southern is a unified railway system, and there is lacking a third party necessary to possible discrimination under that section since a subsidiary of a unified railroad system is not a connecting line within the meaning of section 3(4).

One more comment is appropriate. The President in his message to the Congress on April 5, 1962, recommended legislation directing "the regulatory agencies to sanction experimental freight rates * * *." While this was a recommendation for legislation requiring that experimentation be permitted, it in no way implied that this could or should not be done without specific statutory directive. In fact, in the Commission's testimony in 1962 before the Senate and House Commerce Committees on bills embodying this and other recommendations, it was said: "The Commission has always encouraged carrier experimentation designed to improve service or lower costs whenever this could lawfully be done within the framework of the Interstate Commerce Act." This testimony was reaffirmed by a unanimous Commission this year.

That the proposal here embodies an experiment in freight rates seems clear. It was an exercise of managerial initiative to secure business and maximize revenues through a form of movement novel to grain traffic in the South and by an initial outlay of $13 million for new, improved, and different equipment. It had

[26] See, for example, the discussion as to Central Soya Company, Inc., in the majority report and that as to its barge subsidiary and that of Cargill on pages 661-662 of the division report. It is also observed that the evidence, including the nonuse or misuse of rail service, of no other Tennessee port interest is discussed by the majority.

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no assurances of approval by the Commission. The following expression quoted to the above-mentioned congressional committees as evidence of our reception to freight rate experimentation may have led respondent to expect Commission approval: "They [the respondents] are entitled, as a matter of right, to make the experiment [of reduced rates] unless upon this record we can say that their action or its probable results will violate some provision of the act."[27] Of course, it was specified that the rates must not violate some provision of the act; but it is interesting to note that in a recent case[28] rates were approved which in their relation to out-of-pocket costs were substantially lower than those here found unduly low.

In sum then, I believe the majority report represents, albeit in good faith, an attempt to apportion traffic among the several modes. Competition, I submit, cannot and should not be so limited. Nor should regulatory paternalism replace reasonable managerial judgement.

COMMISSIONER BUSH dissenting:

Although I am in accord with the views of the majority regarding the issue of "public costs," I am of the opinion that the Southern Railway System has, upon this record, sustained its burden of proving the proposed rates subject to a minimum of 450 tons, 90 tons per car, just, reasonable, and not otherwise unlawful. A resolution of this intermodal controversy must necessarily be predicated upon many factors such as the effect of rates upon the movement of traffic by the carriers; the need, in the public interest, of adequate and efficient transportation service at the lowest cost consistent with the furnishing thereof; the need of sufficient revenues to enable the carriers to provide such service under honest, economical, and efficient management; the effect upon competitive modes of regulated transport in the interest of maintaining a sound transportation system as a whole; and a determination of which mode clearly possesses the inherent advantage to justify our ultimate conclusion.

The evidence of record clearly shows that the subject rates, designed to acquire grain traffic from unregulated motor carriage, will have a beneficial effect upon the Southern through acquisition of increased tonnage and revenues by use of technological

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[27] Lumber from Pacific Coast to Eastern Points, 210 I. C. C. 317, 348 (1935).
[28] Coal from Southern Mines to Tampa and Punta Gorda, Fla., 321 I. C. C. 371 (1963).

innovations and achievements. For example, from Evansville, Ind., to Gainesville, Ga., the present rail rate of 890 cents, minimum 100,000 pounds, including accessorial services such as transit, et cetera, produces revenue of $445, whereas $1,476 is derived under the proposal of 328 cents, minimum full visible capacity but not less than 90 tons per car, subject to aggregate minima of 450 tons, applicable only when the grain is shipped at one time on one bill of lading to one consignee at one destination, without transit privileges; connecting line switching charges are not absorbed; and the average agreement rule and other usual domestic demurrage rules and charges do not apply. Moreover, revenue in excess of this latter amount is generally attained, since per car loading of more than 100 revenue tons has been shown by the Southern. The proposal is thus in harmony with the need for sufficient revenues to provide efficient transportation service at the lowest cost consistent with the furnishing thereof in the interest of the public.

Consideration of the record in its entirety leads to the speculative conclusion that any adverse effect of the rail proposal upon regulated, unregulated, and private water carriers is a mere future possibility of economic injury. The absence of sufficient reasonable probability of such injury, causally related to the rail rates, nullifies any theoretical concept that the water competitor will be adversely affected. The record shows that the protestant water carriers are handling grain in increasing annual volume, substantially in excess of that of the respondent railroads, as are unregulated motor carriage, the competitive factor sought to be met. Under such circumstances, there is no valid basis for finding that if the proposed rates are raised to the level approved by the majority, they will not constitue unfair or destructive competition.

In intermodal competitive ratemaking proceedings, it is incumbent upon the protestant bargelines to introduce, among other things, competent and reliable cost evidence to permit our determination that they possess the inherent cost advantage. The fatal deficiencies in their studies of record are so substantial that such evidence cannot be held to be reliable and reasonably representative of the costs of any one or all carriers. Consequently, it cannot be found that protestant bargelines possess the inherent advantage of being the low-cost mode of transport to warrant holding the rates of the railroads up to the level herein judged lawful to protect barge traffic. Moreover, although the

bargelines have also advanced in technological achievements, it is conceded that they have certain inherent *disadvantages* as compared to the railroads, which militate against "umbrella" rate-making.

Although the evidence of record does not establish undue preference and prejudice, assuming *arguendo* the existence of a preferential-prejudicial relationship between the Tennessee River ports and those located thereat, on the one hand, and Ohio and Mississippi River ports, elevators, merchants, and shippers, on the other, I am of the further view that such is not undue so as to bring it within the prohibition of section 3(1) of the act. Preference in favor of competitive points because of unregulated competition which compels reduced rates to those points, below rates charged for shorter distances, is not undue or unreasonable in violation of this section when measured by transportation standards. A determination of this issue requires consideration of not only the differences in charges, but also the convenience of the public, the interest of the carrier, the relative volume of traffic involved, cost and profit, circumstances of the respective parties with reference to each other, as competitive or otherwise, and differences in population and tonnage, and all facts constituting similar or dissimilar conditions as between the respective points. I believe the evidence proves substantial dissimilarities, and weighing all of the foregoing factors leads to the inevitable conclusion that such unlawfulness is nonexistent, nothwithstanding the rate stop of $2.40 for distances up to 346 miles which is not unlawful per se.

I agree intramodal rail carriers should be free to establish rates upon the same basis as the Southern to remain competitive therewith and afford equality of treatment to the users of rail service. However, I am not in accord with the section 3(1) finding by the majority with respect to the Louisville & Nashville and others for the reasons heretofore expressed with respect to the Southern.

In conclusion, I have serious reservation with respect to the administrative finality of the decision in this proceeding, since the majority appears to intend to take further action in the future herein, dependent upon the actual impact of the proposed rates on the approved basis, and the respondents are ordered to maintain car utilization records on the jumbo cars for a year's period so that we may call for a more accurate presentation of their experience. I would render a final decision approving the proposals in their entirety.

APPENDIX A

Intermodal cost comparisons (cents per ton of 2000 pounds)[1]

Destinations—beyond Chattanooga	S.R.S. all-rail f.d. costs	Barge–rail f.d. costs				Difference in favor of barge-rail	S.R.S. all-rail o.p. costs	Barge (f.d.)–rail (o.p.) costs				Difference in favor of S.R.S. all-rail	Percent that barge f.d. (col. 9) must be reduced to equalize cols. 8 and 12
		Barge f.d. costs to Chattanooga	Barge-to-rail transfer	S.R.S. rail f.d. costs beyond Chattanooga	Total barge-rail f.d. costs			Barge f.d. costs to Chattanooga	Barge-to-rail transfer	S.R.S. rail o.p. costs beyond Chattanooga	Total barge-rail		
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
A-1 Origins:													
All-rail—from elevators on Southern Railway in East St. Louis.													
Barge-rail—from elevators on the river at St. Louis, Mo., and East St. Louis, Ill.													
A-2 Destinations:													
Birmingham, Ala—	711	284	75	232	591	120	390	284	75	127	486	96	33.80
Selma, Ala ------	802	284	75	323	682	120	440	284	75	177	536	96	33.80
Palatka, Fla ----	1067	284	75	589	948	119	600	284	75	337	696	96	33.80
Atlanta, Ga------	720	284	75	241	600	120	395	284	75	132	491	96	33.80
Columbus, Ga----	850	284	75	371	730	120	479	284	75	216	575	96	33.80
Macon, Ga-------	799	284	75	320	679	120	438	284	75	175	534	96	33.80
B-1 Origins:													
All-rail—from elevators on Southern Railway in Evansville, Ind.													
Barge-rail—from elevators on the river at Evansville, Ind.													
B-2 Destinations:													
Birmingham, Ala -	617	245	75	232	552	65	351	245	75	127	447	96	39.18
Selma Ala-------	707	245	75	323	643	64	401	245	75	177	497	96	39.18
Palatka, Fla-----	974	245	75	589	909	65	561	245	75	337	657	96	39.18
Atlanta, Ga------	626	245	75	241	561	65	356	245	75	132	452	96	39.18
Columbus, Ga----	756	245	75	371	691	65	440	245	75	216	536	96	39.18
Macon, Ga-------	705	245	75	320	640	65	399	245	75	175	495	96	39.18

[1] All Southern Railway System costs, based on our restatement, are on 5-car multiple-shipments, 90 tons per car, 20,852 car-mile utilization. Barge fully distributed costs are as shown by protestant. For grain shipments originating on Terminal Railroad Association of St. Louis, at St. Louis or East St. Louis add 21 cents per ton to fully distributed costs, and 15 cents per ton to out-of-pocket costs.

APPENDIX B

Out-of-pocket costs and proposed rates in cents per net ton for transportation of grain in 5-car shipments of jumbo hopper cars, minimum weight 450 tons, over Southern Railway System routes, from and to points named in suspended schedules

Destinations	Origins									
	St. Louis		Evansville		Louisville		Cincinnati		Memphis	
	A	B	A	B	A	B	A	B	A	B
Alabama:										
Birmingham	390	312	351	267	268	267	280	317	194	240
Selma	440	361	401	322	318	322	330	372	244	240
Tuscaloosa	419	318	380	298	297	298	309	349	228	240
Florida:										
Palatka	600	581	561	512	478	512	490	526	477	444
Perry	550	519	512	464	429	464	441	478	428	383
Georgia:										
Atlanta	395	386	356	298	273	298	285	311	272	281
Bowman	484	449	445	360	362	360	374	374	362	341
Chamblee	404	386	365	298	282	298	294	311	281	281
Columbus	479	404	440	358	357	358	369	373	357	281
Dalton	345	331	308	243	223	243	236	256	223	243
Flowery Branch	425	408	386	319	303	319	315	333	302	299
Fort Valley	478	444	439	358	356	358	368	371	353	318
Gainesville	432	417	393	328	310	328	322	342	309	308
Macon	438	440	399	351	316	351	328	365	315	327
Paradise Valley	467	428	428	339	305	339	357	353	344	319
Rome	363	355	324	266	241	266	253	279	240	255
Royston	479	449	440	360	357	360	369	374	357	341
North Carolina:										
Albermarle	459	519	420	436	337	367	349	378	398	456
Asheville	373	420	334	338	251	269	263	278	312	358
Charlotte	452	502	413	418	330	350	342	359	391	428
Durham	485	560	446	477	363	409	375	370	424	498
Goldsboro	523	603	484	520	401	452	413	412	462	539
Mocksville	441	494	402	411	319	343	331	351	380	432
Mount Airy	479	541	441	458	357	390	369	364	418	479
N. Wilkesboro	502	559	463	476	380	408	392	382	441	497
Raleigh	497	575	458	492	375	424	387	385	436	513
Rural Hall	459	516	420	433	337	365	349	351	398	455
Statesville	426	486	387	403	304	335	316	343	365	424
Winston-Salem	450	516	411	433	328	365	340	351	389	455
South Carolina:										
Columbia	448	514	409	429	326	382	338	371	387	412
Leesville	468	514	429	429	348	381	358	390	407	412
Spartanburg	404	460	348	377	282	308	294	317	343	385
Orangeburg	481	527	443	436	359	391	371	400	420	422
Summerville	513	539	474	448	391	413	403	422	452	434
Tennessee:										
Chattanooga	328	310	289	260	206	240	218	240	205	240
Knoxville	319	347	280	264	197	240	209	240	258	285
Johnson City	365	398	326	313	243	247	255	255	304	346

A—Out-of-pocket costs.

B—Proposed rates.

APPENDIX C

Out-of-pocket costs including and excluding return on investment, after an allowance for Federal income taxes based on protestants' showing of southern region costs (adjusted) 9-car multiple shipments, 60 tons per car, regular covered hopper cars and boxcars, average trains (cents per net ton)

Destinations and route No.	Regular covered hopper cars—from St. Louis					Boxcars—from St. Louis				
	Out-of-pocket costs including return[1]	Out-of-pocket costs excluding return[2]	Proposed rates increased 16 percent	Ratio of rates to out-of-pocket costs		Out-of-pocket costs including return[1]	Out-of-pocket costs excluding return[3]	Proposed rates increased 16 percent	Ratio of rates to out-of-pocket costs	
				Including return[1]	Excluding return				Including return[1]	Excluding return
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Alabama:										
Birmingham--GM 1---	405	339	362	.89	1.07	336	279	362	1.08	1.30
Do-------IC 1---	363	301	362	1.00	1.20	300	249	362	1.21	1.45
Do-------SF 1---	405	339	362	.89	1.07	336	279	362	1.08	1.30
Selma -----GM 723-	497	413	419	.84	1.01	403	334	419	1.04	1.25
Do-------LN 1891	504	418	419	.83	1.00	409	339	419	1.02	1.24
Florida:										
Palatka-----GM 51--	748	621	674	.90	1.09	602	500	674	1.12	1.35
Do-------LN 1671	736	611	674	.92	1.10	593	492	674	1.14	1.37
Do-------SF 41--	748	621	674	.90	1.09	602	500	674	1.12	1.35
Georgia:										
Atlanta-----GM 50--	599	497	448	.75	.90	483	401	448	.93	1.12
Do------IC 95--	553	459	448	.81	.98	448	372	448	1.00	1.20
Do------LN 1---	436	362	448	1.03	1.24	358	297	448	1.25	1.51
Do------LN 690-	597	496	448	.75	.90	482	400	448	.93	1.12
Columbus---GM 55--	531	441	469	.88	1.06	430	357	469	1.09	1.31
Do-------IC 145-	486	403	469	.97	1.16	394	327	469	1.19	1.43
Do-------LN 960-	530	440	469	.88	1.07	429	356	469	1.09	1.32
Do-------SF 80---	531	441	469	.88	1.06	430	357	469	1.09	1.31

See footnotes at end of table.

Out-of-pocket costs including and excluding return on investment, after an allowance for Federal income taxes based on protestants' showing of southern region costs (adjusted) 9-car multiple shipments, 50 tons per car, regular covered hopper cars and boxcars, average trains (cents per net ton)—Continued.

Destinations and route No. (1)	Regular covered hopper cars—from St. Louis					Boxcars—from St. Louis				
	Out-of-pocket costs, including return[1] (2)	Out-of-pocket costs excluding return[2] (3)	Proposed rates increased 16 percent (4)	Ratio of rates to out-of-pocket costs		Out-of-pocket costs including return[1] (7)	Out-of-pocket costs excluding return[3] (8)	Proposed rates increased 16 percent (9)	Ratio of rates to out-of-pocket costs	
				Including return[1] (5)	Excluding return (6)				Including return[1] (10)	Excluding return (11)
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Macon----GM 55-----	589	489	510	.87	1.04	476	395	510	1.07	1.29
Do----IC 145----	544	452	510	.94	1.13	440	365	510	1.16	1.40
Do----LN 145----	527	437	510	.97	1.17	427	354	510	1.19	1.44
Do----LN 762----	666	553	510	.77	.92	533	442	510	.96	1.15

[1]Based on protestants' costs.
[2]Column 2 less 17 percent.
[3]Column 7 less 17 percent.

APPENDIX D

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of July A. D., 1963

INVESTIGATION AND SUSPENSION DOCKET NO. 7656

GRAIN IN MULTIPLE-CAR SHIPMENTS—RIVER CROSSINGS TO THE SOUTH

It appearing, That by orders dated August 7, 1961, and August 28, 1961, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations stated in certain schedules described in said orders, and the operation of the schedules was suspended to and including March 9, 1962, and that the effective date was voluntarily deferred to and including August 7, 1962, and that the effective date of such schedules was further held in abeyance by Federal court orders until May 11, 1962, when the schedules at issue herein became effective.

It further appearing, That on January 21, 1963, Division 2 entered its report and order in this proceeding, and that upon petitions of the parties and replies thereto the proceeding was reopened for reconsideration by order dated April 12, 1963;

And it further appearing, That upon reconsideration of the record in this proceeding, the Commission has made and filed a report on reconsideration containing its findings of facts and conclusions thereon, which report, and the prior report are hereby referred to and made a part hereof;

It is ordered, That the order entered in this proceeding on January 21, 1963, which order, pursuant to section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petitions, be, and it is hereby, vacated and set aside;

It is further ordered, That the respondents herein be, and they are hereby, notified and required to cancel the schedules under investigation in this proceeding, on or before August 26, 1963, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commisison.

HAROLD D. McCOY
Secretary

(SEAL).

APPENDIX E

29070

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 7656

GRAIN IN MULTIPLE-CAR SHIPMENTS—RIVER CROSSINGS TO THE SOUTH

Decided January 21, 1963

Proposed Southern Railway System multiple-car rates, minimum 450 tons, on grain from Mississippi and Ohio River crossings to specified destinations in southern territory, and between points in Florida and Georgia found just and reasonable, and otherwise lawful, except for specified tariff provision. All other proposed rates of respondents found not shown to be just and reasonable. Schedules ordered canceled to the extent found not shown to be lawful, and proceeding discontinued.

J. C. Ashton, Jr., John M. Cleary, John F. Donelan, Lawrence F. Downey, R. D. Erickson, E. R. Leigh, Karl D. Loos, Romano L. Mazzoli, W. E. McLean, William J. O'Brien, Jr., Clarence Raymond, William P. Stallsmith, Jr., James L. Tapley, Donal L. Turkal, and *Ray M. Van Hook* for respondents.

Jack W. Boehl, Karl C. Grannan, and *Joseph E. Quin* for the Secretary of Agriculture of the United States in support of respondents.

David O. Benson, Parke C. Brinkley, S. M. Carbough, R. D. Chumney, L. N. Conyers, T. Vernon Hansen, M. A. Hubbard, James R. Mann, Walter R. McDonald, W. C. Seibert, Charles B. Sherman, R. H. Strickler, Matthew L. Triggs, C. E. Widell, and *J. Paul Williams* in support of respondents.

Charles J. McCarthy, George B. Tully, and *Lewis E. Wallace* for the Tennessee Valley Authority, protestant.

Harry C. Ames, Victor Anderson, W. L. Anderson, George F. Bason, Hubert L. Bass, John A. Bauer, Neal D. Belnap, Freeman Bradford, James F. Bromley, C. J. Burrill, Ed. P. Byars, J. S. Chartrand, J. L. Cox, John H. Eisenhart, Richard M. Freeman, James L. Given, Byron M. Gray, C. D. Haig, Jr., Robert E. Harridge, J. J. Hartnett, I. M. Herndon, Robert E. Hicks, J. W. Holloway, Paul T. Jackson, W. A. Knight, James L. Kunen, J. B. Leffel, A. E. Leitherer, John C. Lovett, J. A. Lynch, Donald Macleay, Ellis B. Martin, Guy Martin, Henry Romer McPhee, Paul L. Mills, Clinton Moore, Gerald D. Morgan, Max G. Morgan, Cecil P. Newsom, M. C. Pearson, C. A.

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Poelker, Wesley A. Rogers, Donald C. Savelkoul, L. W. Schaller, J. R. Scoggin, Walter R. Scott, Bernard A. Springrose, J. V. Springrose, Joe Starnes, Joe Starnes, Jr., Erwin H. Strobel, Frank B. Tatara, Robert M. Tyrie, Ralph L. Wampler, W. Y. Wildman, George Wilkens, Wilburn L. Williamson, and *Henry J. Yunch* for protestants or in support thereof.

Charles B. Bowling, Joseph J. Brown, Louis A. Schwartz, C. M. Steelsmith, Theodore H. Troxel, and *E. J. Weigel* as their interests may appear.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND BUSH

FREAS, *Commissioner:*

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Contentions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on August 10, 1961, for account of the Southern Railway System (Southern) only, and on August 20, 1961, for account of the Southern and other rail carriers [1] in the South, Southern Freight Association, agent, proposed to establish all-rail rates [2] on grain, including wheat, buckwheat, corn, oats, rye, barley, grain sorghums, and soybeans, but not including products thereof, in multiple-car lots, from certain Ohio and Mississippi River crossings [3] to specified points in southern territory. [4] By schedules filed to become effective August 31, 1961, a number of the carriers here involved proposed to establish a similar basis of rates from Live Oak and Rawls, Fla., and certain points in southern Georgia to Jacksonville, Fla., and points in Georgia. Upon protest of numerous parties, the operation of the schedules was suspended to and including March 9, 1962. The effective date was voluntarily further postponed to and including August 7, 1962.

Certain protestants then sought to have four of the respondent railroads enjoined from putting the rates into effect before the Com-

[1] Including, among others, the Louisville and Nashville Railroad Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railroad Company, and the Illinois Central Railroad Company, hereinafter referred to by their short names.

[2] Rates and costs are stated in cents per net ton unless otherwise indicated.

[3] St. Louis, Mo.; East St. Louis, Cairo, and Metropolis, Ill.; Evansville, Ind.; Louisville, Ky.; Cincinnati, Ohio; and Memphis, Tenn.

[4] Southern territory, as used in the tariffs and in this report, includes points in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee.

mission had completed its investigation. The Federal District Court for the Northern District of Alabama denied a motion for a preliminary injunction and a temporary restraining order. Plaintiffs then asked the United States Court of Appeals for the Fifth Circuit for an injunction pending appeal. On August 3, 1962, a circuit judge granted a temporary restraining order so that the court of appeals could consider the matter. The court of appeals refused to grant an injunction pending appeal by plaintiffs but continued the temporary restraining order to give plaintiffs the opportunity to seek relief from the Supreme Court or a Justice thereof. On August 17, 1962, Mr. Justice Black extended the temporary restraining order pending presentation to the Supreme Court of a petition for a writ of certiorari to review the decision of the court of appeals denying the injunction pending appeal, and pending final consideration and action by the Supreme Court on that petition. On September 7, 1962, the court of appeals affirmed the district court's holding that courts are without jurisdiction to enjoin or suspend rates published by common carriers before entry of a final order by this Commission. On October 15, 1962, the Supreme Court granted a petition for a writ of certiorari in *Arrow Transp. Co.* v. *Southern Ry. Co.*, 371 U.S. 859. As a result, the effective date of the proposed rates on interstate traffic is stayed pending the Supreme Court's decision.

A prehearing conference was held on October 10, 1961. The hearing extended from January 8, 1962, to August 29, 1962, and briefs were filed on November 5, 1962.

INTERESTED PARTIES

As indicated, numerous parties oppose the proposed adjustment. Those appearing at the hearing and filing briefs as protestants include bargeline interests (both certificated and noncertificated carriers and their trade and tariff associations), the Indianapolis Board of Trade, the Oklahoma Corporation Commission, the Enid, Okla., Board of Trade, Merchants Exchange of St. Louis, the Board of Trade of Chicago, the Tennessee Valley Authority, The State Corporation Commission of Kansas, a number of other boards of trade, grain exchanges, milling interests, elevator operators, and traffic and trade associations in Missouri, Kansas, Oklahoma, Indiana, and Texas, the Southeastern Association of Local Grain Producers, Merchandisers, and Consumers (Southeastern Association), the Tennessee River and Tributaries Association, the City of Guntersville, Ala., the Guntersville Chamber of Commerce, and two southern grain merchandisers, Central Soya Company and Cargill, Incorporated.

Those appearing at the hearing in support of respondents and who filed briefs include the United States Department of Agriculture, the Southern Governors' Conference, the Southeastern Association of Railroad and Utilities Commissioners, the Virginia Department of Agriculture, and numerous Virginia agricultural interests. While the Southern also filed a brief, the other railroad respondents filed none and take a neutral position, explaining that they have published the proposed rates to remain competitive.

APPLICATION AND DESCRIPTION OF PROPOSED AND PRESENT RATES

The Southern, the chief proponent of these rates, published the above schedules to apply on straight or mixed shipments, minimum full visible capacity but not less than 180,000 pounds per car, subject to aggregate minima of 450 tons [in 5 cars], 900 tons [in 10 cars], and 1,800 tons [in 20 cars]. The Southern-owned cars which would be utilized are extra large aluminum covered hoppers with four separate compartments. At the end of the hearing herein, the Southern owned over 500 of these "jumbo" cars at a cost of $13 million. The schedules published by the other railroads differ from the above in that they are based on a minimum of 100,000 pounds per car for regular boxcars, but subject to the same minima per shipment. These carriers would, for the most part, move the grain in regular boxcars with 9 cars, minimum 450 tons; 18 cars, minimum 900 tons; and 36 cars, minimum 1,800 tons, although in certain instances the movements would be in 8, 16, and 32 cars.

The proposed rates are in addition to the present single-car rates and are subject to the following provisions: They apply only when the grain is shipped at one time on one bill of lading to one consignee at one destination; they are subject to the origin and intermediate point rules; transit privileges are not accorded; connecting line switching charges are not absorbed; and the average agreement rule and other usual domestic demurrage rules and charges do not apply. For example, after 24 hours' free time, counted from the time of placement of the multiple-car unit, each car in the multiple-car shipment will be subject to increased demurrage charges of $7 for each of the first 2 days and $11 per car per day thereafter. The charges will run against each car as long as any car in the shipment is detained.

Rates on the same basis as those proposed are currently in effect for intrastate application in Georgia and North Carolina, and are expected to be made effective in other States. Also, a section 22 quotation, as amended, has been issued to the United States Department of

Agriculture, Commodity Credit Corporation, granting the multiple-car rates on corn from the involved river crossings to points in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. That quotation includes single-car rates on corn, minimum 180,000 pounds, which reflect 120 percent of the multiple-car rates.

The proposed rates per ton are based on the docket 28300 [1] short-line distances as multiplied by 0.573 cent and then adding 42 cents for terminal service. For distances of 346 miles or less the proposed rate is 240 cents, minimum 450 tons. Rates subject to the 900-ton minimum are uniformly 10 cents lower per ton than those subject to the 450-ton minimum, and the rates subject to the 1,800-ton minimum are uniformly 10 cents lower than those subject to the 900-ton minimum.

Representative proposed rates follow:

Proposed multiple-car rates from river crossings to certain points

From—	To—	Docket 28300 mileage	Proposed rates, minima, net tons—		
			450	900	1,800
		Miles	*Cents*	*Cents*	*Cents*
Cincinnati, Ohio	Guntersville, Ala.[1]	430	270	260	250
	Birmingham, Ala.	480	317	307	297
	Atlanta, Ga.	470	311	301	291
	Flowery Branch, Ga.	507	333	323	313
	Gainesville, Ga.	523	342	332	322
	Asheville, N.C.	412	278	268	258
Evansville, Ind.	Guntersville, Ala.[1]	364	258	248	238
	Birmingham, Ala.	361	257	257	247
	Atlanta, Ga.	441	298	288	278
	Flowery Branch, Ga.	478	319	309	299
	Gainesville, Ga.	494	328	318	308
	Asheville, N.C.	515	338	328	318
St. Louis, Mo.	Guntersville, Ala.[1]	517	321	311	301
	Birmingham, Ala.	472	312	302	292
	Atlanta, Ga.	601	386	376	366
	Flowery Branch, Ga.	638	408	398	388
	Gainesville, Ga.	654	417	407	397
	Asheville, N.C.	660	420	410	400
Memphis, Tenn.	Guntersville, Ala.[1]	298	240	230	220
	Birmingham, Ala.	251	240	230	220
	Atlanta, Ga.	417	281	271	261
	Flowery Branch, Ga.	448	299	289	279
	Gainesville, Ga.	465	308	298	288
	Asheville, N.C.	552	358	348	338
Louisville, Ky.	Guntersville, Ala.[1]	395	265	255	245
	Birmingham, Ala.	392	267	257	247
	Atlanta, Ga.	446	298	288	278
	Flowery Branch, Ga.	483	319	309	299
	Gainesville, Ga.	499	328	318	308
	Asheville, N.C.	397	269	259	249

[1] Guntersville is not served by the Southern.

The following table compares the present barge-rail rates, including transfer charges, and the single-car all-rail rates on corn, one of the

[1] *Class Rate Investigation, 1939*, 262 I.C.C. 447, and supplemental reports.

more important commodities, from and to representative points with the proposed rates, minimum 450 tons:

From—	To—	[1] Present barge-rail rates [2] on corn		All-rail rates	
		Via Guntersville, Ala.	Via Chattanooga, Tenn.	Single-car rates on corn	Proposed rates (450 tons)
		Cents	*Cents*	*Cents*	*Cents*
Evansville, Ind	Birmingham, Ala	520	727	710	267
	Atlanta, Ga	610	807	830	298
	Flowery Branch, Ga	650	627	870	319
	Gainesville, Ga	630	627	890	328
	Asheville, N.C	990	847	910	338
St. Louis, Mo	Birmingham, Ala	548	755	870	312
	Atlanta, Ga	638	635	1,010	396
	Flowery Branch, Ga	578	655	1,030	408
	Gainesville, Ga	658	655	1,050	417
	Asheville, N.C	1,018	875	1,050	420

[1] Minimum tariff weight on these barge rates is 750 net tons via Arrow Transportation Company.
[2] Includes transfer charges.

The foregoing barge-rail rates on corn are combination rates via Guntersville, Ala., and Chattanooga, Tenn., to various representative points in the South. None of the lowest combination rates to each destination shown exceeds the single-car all-rail rate to the same destination. The proposed rates, minimum 450 tons, are lower than the lowest compared combination rate in every instance.

OBJECTIONS TO EVIDENTIARY RULINGS

Before further evaluation of the evidence and the positions of the parties, consideration will here be given to those objections to evidentiary rulings of the hearing examiner pressed in brief pursuant to rule 1.87 of the Commission's General Rules of Practice. The Southern refers to excerpts of testimony of bargeline officials and others before congressional committees. The Southern submits that such statements should have been received as probative evidence of the magnitude and other aspects of water transportation, contending that what the bargelines assert as facts before one Federal body cannot be denied before this Commission. The examiner declined to receive the above statements made outside the hearing room, and concluded that they constitute argument and belong in brief where they are now reiterated. We agree with the examiner.

Bargeline protestants submitted water-carrier and rail costs on a fully distributed basis, and made comparisons thereof. The Southern objected to such evidence, and on brief contends that it is irrelevant, immaterial, and incompetent. Fully distributed costs have heretofore been considered as properly a facet of intermode competitive

pricing situations under section 15a(3) and the national transportation policy. The objection is overruled.

The Southern also objected to the examiner's ruling excluding, as immaterial, certain opinion testimony of a Southern cost witness concerning bargeline costing methods. In our opinion, however, such testimony by a qualified witness was proper as rebuttal opinion and comment. The issue here is one of weight rather than admissibility, and respondent's objection is sustained. The testimony is received in evidence.

The Southern also renews its objection to the receipt of evidence with respect to the rates and rules on flour and other grain products. The proposed rates have no application to grain products. Nevertheless, the aforementioned evidence forms the basis of midwestern flour mill contentions that the rates on wheat would, by approval here, be lower than the rates on flour thereby unduly preferring destination mills. The receipt of relevant evidence on this material issue was proper and the objection is overruled.

The Southern objects to the receipt of protestants' numerous counsel exhibits as not constituting evidence. It takes the position that these exhibits were not supported by any witness, no one was available for cross-examination regarding them, and there was not adequate opportunity for the respondents to rebut the arguments made. In accepting these exhibits, the examiner ruled that the test is whether there is foundation properly in the record through sworn witnesses. All of the challenged exhibits stem from the working papers of one of the respondent's witnesses, offered in evidence by protestants' counsel. The several exhibits consist merely of arithmetical computations resulting from eliminating different factors to arrive at the volume of grain to be charged to truck transportation. We are of the view that the exhibits were admissible and sustain the examiner's rulings.

Protestant bargelines, on brief, also renew certain objections raised at the hearing. Their first such objection relates to certain documents and testimony intended to demonstrate that "public costs" should be applied to the formulas for determining bargeline costs for grain traffic to the Tennessee river ports. These costs include such items as public improvements of rivers, harbors, and canals, with a portion of the cost thereof allocated to barge traffic. The argument of the protestants is that these do not constitute costs incurred by the carriers and therefore should not be considered in either ratemaking or in the determination of water carrier costs. Protestants declined to cross-examine on this evidence, and that right is therefore waived. As stated above concerning an objection of the Southern, fully distributed cost evidence has heretofore been considered to be properly a facet of intermode competitive pricing situations. Here,

the "public cost" evidence bears on that issue and was properly admitted; the objection is overruled.

The next objection deals with certain testimony introduced by the Southern as part of its rebuttal. This was testimony by economists concerning the cost theory that a private enterprise can increase its profits by pricing its services in the light of marginal costs. The protestant bargelines objected to this as new matter that should have been presented in the Southern case in chief and therefore is improper rebuttal. They particularly stress the objection because the hearing examiner had previously announced that no surrebuttal would be permitted. The hearing examiner took the view that the testimony was additional expert opinion such as had been presented by practically all parties. Acting in his discretion, he permitted the testimony. We cannot find on this record that the ruling constituted an abuse of discretion.

Finally, the bargelines allege error in the refusal of the hearing examiner to permit cross-examination as to the divisions of joint all-rail rates received by rail carriers for hauling ex-rail grain from the Tennessee river ports. In seeking this testimony, the bargelines relied on the decision of the court in *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *affirmed per curiam sub. nom.*, *Kansas Corp. Comm.* v. *Arrow Transp. Co.*, 361 U.S. 353 (1960). In that case, involving a formal complaint before the Commission as to the lawfulness of ex-barge rates, the court held that the divisions received by the rail carriers for the transportation of ex-rail grain are prima facie evidence as to what charge should be assessed on ex-barge grain from the same port to the same destination. The proposed rates here apply from the Ohio and Mississippi River crossings only, and equally on ex-barge, ex-rail, and ex-truck grain. Accordingly, evidence of the divisions received by the rail carriers for the transportation of ex-rail grain from such points is irrelevent and immaterial. As to divisions received on ex-rail grain from the Tennessee River ports, no rates from those ports are here under investigation by virtue of the orders of suspension. In any event, receipt of such evidence would presume the existence of similar circumstances and conditions surrounding the transportation services performed. As indicated hereinafter, such factors do not exist as to the Southern. As to the other respondents, our conclusions as to their proposed rates make further consideration of this objection unnecessary. The ruling of the hearing examiner is affirmed.

Protestant, Central Soya Company, Inc., on brief, also renews an overruled objection. This concerned the testimony of one of the respondent Southern's witnesses on rebuttal explaining and clarifying

the purpose and comprehensiveness of a 1958 Department of Agriculture study, submitted in evidence by protestant, in which that witness participated as an official of the Department. The basis of the objection is that the critical testimony was not proper rebuttal and should have been presented as a part of the Southern's case in chief, particularly since protestants were denied the opportunity for surrebuttal thereto. However, the study which was the subject of his testimony was not adverted to or introduced by the witness during the Southern's presentation in chief when he testified as to another matter. In fact, at that time, protestants were not allowed to inquire into the matter even though they were willing to make the witness their own. Objection to the latter ruling is not preserved on brief. Since the study was introduced into the record as a part of the protestant's presentation in chief, criticism of it during rebuttal was appropriate. The overruling of the objection by the examiner is affirmed.

RAIL GRAIN RATE HISTORY [6]

The southern States do not grow a sufficient quantity of grain to meet their needs. The various grains brought into this territory to supply the deficiency come primarily from areas north and west of the Ohio and Mississippi Rivers. These commodities may move as whole grains or, after processing, as various products thereof. Freight rates and rules historically have had an effect upon where the grains will be stored, marketed, and processed, and hence, where the elaborate facilities therefore will be located. In this respect, the level of the rates, regulated and unregulated, of the various modes of transportation has influenced the routes of movement.

The interterritorial carload rates on grain and grain products from origins in central, Illinois, western trunkline, and southwestern territories to destinations in southern territory are generally made by combining the rates of the northern and western lines to Ohio and Mississippi River gateways with those of the southern lines from these gateways. Within southern territory and from these gateways to southern territory destinations rail transportation has been at rates the same on both grain and grain products, subject to transit privileges at points where feed and flour mills are located. The mills thereby secured, on separate shipments of inbound grain and outbound products, the benefit of the through rates via the transit points to the final destinations of the products. No charge was made for the transit privileges at points in southern territory.

[6] A detailed history and consideration of grain traffic in the South is found in *Grain to, from, and within Southern Territory*, 259 I.C.C. 629 (1945), hereinafter called the *Southern Grain case*.

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EVIDENCE AND POSITION OF RESPONDENTS AND SUPPORTING PARTIES

Respondent Southern.—As indicated, the proposed rates are in addition to the system of single-car rates with transit. The Southern maintains, however, that while that system will continue to exist there have been the following important changes in the past 17 years since the *Southern Grain* case considered a general adjustment thereof.

1. The major part of the grain movement to points in southern territory is now handled by barge and truck, with truck competition more widespread and greater than barge. The Southern contends that, for the most part, itinerant truckers move farm produce or other exempt commodities to the North and on the return trip haul grain for gasoline money from Ohio, Indiana, northern Kentucky, and Illinois into the South, and to some extent from Pennsylvania and Maryland into the Carolinas; both movements pursuant to the agricultural exemption of section 203(b)(6) of the act. The trucks provide no transit arrangements; some certificated bargelines publish transit rules but shippers rarely, if ever, use them. The transportation of grain by these modes is in no way connected with the movement of the products of the grain; the inbound shipments of grain and outbound shipment of products pay separate transportation charges.

2. The present system of rail rates (which applies both on wheat and flour, a grain product) reflects the adjustment which the Commission considered in its decision in the *Southern Grain* case. However, the rates which were applicable on coarse grain and feed (a grain product) were reduced August 1, 1957, and again on November 2, 1959. These reduced rates, effective on the latter date for application between points in the southern territory, also have application from Cincinnati, Louisville, Evansville, St. Louis, Memphis, and East St. Louis, Ill., to points in southern territory as factors in making combination rates on interterritorial traffic from origins in central and Illinois territories and from points west of the Mississippi River to points in southern territory. The Southern contends that as a result of these adjustments and other factors there is no equalization today of the rail rates through the several markets and gateways on traffic from Illinois and western trunkline territories.

3. The present overall system of single-car rates subject to transit privileges has not been effective in increasing the movement of grain by rail, despite the marked growth in grain shipments. In recent years, many specific commodity rates have been established for application on grain only, including wheat, which are lower than the overall system of rates which includes grain and the products of grain. The existing rail movement of ex-barge grain from Tennessee river

points to destinations in southern territory is under specific commodity rates which apply only on grain. For example, the rate on grain from Chattanooga to Gainesville, Ga., is 14.5 cents per 100 pounds, but under the scale of rates which applies on coarse grain and feed, the rate is 21.5 cents for the distance from Chattanooga to Gainesville. There are numerous other specific commodity rates now in effect between points in southern territory which are lower than the scale rates which apply both on coarse grain and feed. Thus, the Southern contends, it is no new situation in southern territory to have lower rates on grain than the overall rates which apply on both grain and the products thereof. Further discussion of the Southern's position appears hereinafter under other subheadings.

Transit.—As noted, transit privileges are not authorized in connection with the proposed rates, and the Southern urges that such privileges would serve no purpose since neither truck or barge grain is transited. Moreover, it is demonstrated of record that the trend is against the use of transit by mills in the South, culminating in 1960 when 174,339 tons of wheat moved inbound to "dry land" mills by rail and truck, with 87,790 tons thereof not handled under transit. The total corn tonnage for that year amounted to 658,770 tons, substantially half of which moved by truck. Of the total amount, transit bills were used on only 236,220 tons. In the same year, the total amount of grain and soybeans by rail inbound to transit operators at points served by the Southern in Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee was 677,868 tons. By truck the tonnage was 582,948 and by barge it was 1,223,573 tons, or a total of 2,484,389 tons. Of this total, 1,947,412 tons of grain or soybeans were not handled under transit privileges. This tonnage is 78.4 percent of total tons of grain and soybeans to transit operators. The Southern takes the position that grain shippers from Illinois or Indiana desiring storage en route before reaching the river crossings do not necessarily need transit. Thus, they say, storage can exist independently of transit. As hereinafter indicated, interests supporting respondents also discount the need for transit.

Southern Governor's Conference.—The conference supports the proposed rates because of the tremendous area growth of the livestock and poultry business. It believes that approval of these rates will bring stability to the marketing of grain in the South, and that there would be a diversion to regulated carriers at their published tariff rates of grain which, it asserts, is now moving, in the great preponderance, unregulated at unknown charges.

While the charges of the unregulated trucks are not matters of public knowledge, the conference submits as illustrations a number of railroad grain rates published to meet such competition. These rates

are shown in the table below, stated in cents per 100 pounds; they follow no consistent pattern and do not appear to be based upon known transportation factors.

From—	To—	Docket 28300 mileage	Coarse grain scale	Specific grain rate
		Miles	*Cents*	*Cents*
Chattanooga, Tenn.	Atlanta, Ga.	133	18.5	13.5
Elloree, S. C.	Statesville, N. C.	140	18.5	[1] 22.5
Guntersville, Ala.	Elberton, Ga.	239	25.5	14.5
Moultrie, Ga.	Athens, Ga.	238	25.5	22.5
Chattanooga, Tenn.	Elberton, Ga.	239	25.5	18.0
Adel, Ga.	Atlanta, Ga.	193	22.5	21.5
Selma, Ala.	Tampa, Fla.	508	45.5	[2] 28.0
Decatur, Ala.	Macon, Ga.	332	33.5	27.5

[1] For wheat.
[2] For corn.

The conference does not believe that the multiple-car rates will discriminate against the small shipper. In Georgia, where these rates are effective for intrastate application, elevators with total grain storage capacity of 10,000 to 12,000 bushels load multiple-car shipments of some 18,000 bushels within the free time provided by the 24-hour tariff rule. Moreover, it is shown that additional storage facilities can be economically constructed.

It is urged by the conference that transit is a cost consideration and is employed or ignored on the basis of whether its use or nonuse produces the lowest transportation costs. It demonstrates that there is nothing about the physical movement or marketing of grain that requires transit. Examples were shown to demonstrate that the nonuse of transit where transit billings are available is not peculiar to the South; the operators choosing instead to utilize lower flat rates.

It is shown that proportional rates from the river crossings generally are not effective now because the coarse grain scale produces lower rates and there is no gateway equalization. The record indicates that, as far as coarse grain and mill feed are concerned, many processors at the river crossings are operating on a nontransit basis.

Flour mill relocation.—The conference does not believe that relocation in the South of the flour milling industry would be a result of the proposed adjustment. In support of its position, it demonstrates that the presently effective barge and railroad rates afford no equalization between the delivered cost of wheat and flour in the South. Using present all-rail rates Minneapolis wheat can be milled at that point into flour and delivered at Atlanta at a through rate of 111 cents per 100 pounds. However, using the barge-rail combination via Chattanooga, the Chattanooga mill operator can mill the Minneapolis wheat into flour and deliver it at Atlanta for 46.05 cents, or about 65 cents less than can the Minneapolis operator. Under the present

barge-rail rate of 38.55 cents, a miller in Atlanta has an advantage over the Chattanooga miller of 7.5 cents. Similarly, the Chattanooga miller using Kansas City wheat has an advantage of 31.4 cents under the present rates over the Kansas City miller in delivering flour to Atlanta, and the Atlanta miller has an advantage of 38.9 cents over Kansas City mills. The suspended rates would increase the Atlanta miller's advantage over Minneapolis and Kansas City by about 10 and 20 percent, respectively. However, the evidence shows that despite the substantial existing rate advantage to be gained by establishing mills in the South no new flour mills have been built there for many years; one important factor being the substantial cost of such mills. Another reason for the failure of flour mills to relocate from the Midwest to the South is the need for disposing of mill feeds, there being 38 pounds thereof for each 100 pounds of flour produced. The South requires high energy, high protein feed, and mill feed does not fulfill this requirement. Mill feeds actually produced in the South approximate twice the mill feeds consumed by feed producers in this area. Thus, the conference shows that this area is not a good market for mill feed and the new flour mills located in the South would have to ship mill feed back to the North or the West. Much of the flour produced in the South is from soft wheat and soft wheat tends to produce more mill feed than hard wheat.

Feed mill relocation.—The conference establishes that feed milling has become an established southern industry. Fifteen years ago most of the feed used in the South was produced at Memphis or some large interior point such as Atlanta and Birmingham, and there was a period when it appeared that the feed milling industry was going to move to the Tennessee River. However, with the tremendous growth of the broiler industry in the Southeast, beginning in 1955, the feed millers became more concerned with customer service than transportation. The result was that this industry has become virtually market oriented.

Of the various feeds consumed in the South, 47.9 percent are broiler feeds compared with the national average of 12.6 percent, and broiler feeds contain no mill feed. There are some feeds which are higher in mill feed content, such as hog and dairy feed. However, in the South, dairy feed accounts for only 10.2 percent of total feed production whereas for the United States outside the South it accounts for 21.3 percent. Hog feed, which also uses substantial quantities of mill feeds, accounts for only 6.8 percent of feed mill production in the South, as compared with 16.6 percent of production outside the South.

Jumbo hopper cars.—The Southern demonstrates that the grain traffic into the South in the last 10 years has materially increased but that its traffic has remained relatively static. It asserts that it is

apparent that it has failed to participate effectively in the growth of the grain movement. In endeavoring to meet this situation, it has striven to improve its equipment and to increase operating efficiency. One important step in this direction has resulted in a much better type of railroad car which is easier for shippers to load and unload, and is better suited for the movement of grain.

At present,[2] the Southern has approximately 500 jumbo (or "Big John") aluminum covered hopper cars for this movement, representing an investment of about $13 million, with stated cubic capacities of

ERRATA

Investigation and Suspension Docket No. 7656

(Correction to be inserted in pamphlet copy of Opinion No. 29970)

On page 654, fourth sentence in first full paragraph should read:

"Grain must be loaded in boxcars from the center door, with the piping manually carried to the ends and corners of the car, and unloaded through the center door."

four types of grain is not possible in a noncompartmented boxcar. Also, the movement of grain in the ordinary boxcar requires a paper grain door to prevent spillage with a cost per door of $11.27. No such grain doors are necessary in the jumbo aluminum cars.

The jumbo cars require minimal maintenance in spite of the fact that in the 2 years of their service since their acquisition in the hauling of other bulk commodities more mileage was accrued than in 10 or 15 years of other railroad freight equipment. The number of tons hauled in that 2-year period was more than would move on regular railroad freight equipment in 15 or 20 years. Less switching is involved inasmuch as more grain moves in fewer cars. Also, these cars are capable of hauling other bulk commodities such as lighter clays and shale.

Operating efficiencies.—Appendix A lists numerous examples of operating efficiency on the part of the Southern and the Louisville & Nashville. Both lines are now completely dieselized and utilize the latest electronic data processing machinery and other modern equip-

[2] At the start of the hearing, January 8, 1962, the Southern owned 175 jumbo cars and at the end, August 29, 1962, it possessed 500 such cars, each with 4 separate compartments.

ment. The Louisville & Nashville presently has a $4 million improvement program underway in its freight car shops. The evidence demonstrates that these continuing programs of improvements reduce transportation costs, thus aiding these respondents in their efforts to meet carrier competition and to benefit the shipping public.

Other respondents.—Other testimony also was submitted by the Louisville & Nashville, and by the Gulf, Mobile and Ohio Railroad Company, the Illinois Central, the Atlantic Coast Line Railroad Company (Coast Line), the Seaboard Air Line Railroad Company (Seaboard), the Florida East Coast Railway Company, and the St. Louis-San Francisco Company (Frisco). They take the position that should the rates become effective for the Southern they must likewise be made effective on their lines to prevent chaos and protect their grain shippers' interest. The record shows that they are neither for nor against the proposed rates. They state that where their tariffs provide rates above or below the basis published by the Southern corrections will be made to reflect the Southern's basis of rates.

The Louisville & Nashville (and the Southern) stated intentions to publish single-car rates at 120 percent of the proposed 450-ton multiple-car rates if they are approved. Also the Louisville & Nashville stresses that if in a multiple-car placement of nine cars, five cars remain loaded beyond the 24-hour free time, all nine cars will be charged with demurrage per car for the time held beyond this period. For the proposed movement of grain, other than oats, the Louisville & Nashville would generally use 40-foot boxcars, 9 cars minimum 450 tons, 18 cars minimum 900 tons, and 36 cars minimum 1,800 tons. As previously noted, in some instances 8, 16, and 32 cars would be utilized for those respective minima.

The Louisville & Nashville states that the movement of grain is important to its survival, and more so than it is to the Southern and The Cincinnati, New Orleans and Texas Pacific Railway Company (CNO&TP), the latter being part of the Southern Railway System. The following table shows the movement and revenue on all grain, in carloads, for these carriers for the years 1958, 1959, and 1960, and the first 9 months of 1961:

Year	Total carload revenues			Tonnage moved by—		
	Louisville & Nashville	Southern	CNO&TP	Louisville & Nashville	Southern	CNO&TP
1958	$3,099,926	$3,265,869	$399,327	439,182	453,805	207,953
1959	2,676,703	2,404,864	314,417	415,524	351,365	182,048
1960	2,973,374	2,644,450	384,232	469,845	739,936	257,807
1961	2,490,999	1,954,644	312,001	5[illegible],843	550,140	199,617

This traffic is considered important to the Illinois Central inasmuch as in 1960 it terminated 445,159 tons of whole grains and soybeans at points in Alabama, Kentucky, Mississippi, and Tennessee, and 834,959 tons in Louisiana. Of this latter figure approximately 804,800 tons were for export, leaving a domestic balance of 30,152 tons, or a total of 475,311 tons in the South. Its system revenue on grain and soybean traffic in 1960 was $14,811,170, or over 6 percent of its total of $226,752,953. During 1960, its grain traffic ranked second only to coal in revenue volume. Under the proposed rates, it would employ 9, 18, and 36 of its smaller 100,000-pound capacity cars.

The Frisco published rates on the same basis as the Southern from St. Louis and Memphis to points in the Southeast. From January 1 to and including June 30, 1961, this respondent handled 2,480 cars of wheat and coarse grain, which terminated in the involved area. This traffic reflected revenue amounting to $500,000, and thus is considered important to this carrier.

While the Coast Line does not reach the Ohio River points, it does operate over some 5,500 miles in Alabama, North Carolina, South Carolina, Georgia, Florida, and Virginia. In 1960, this respondent handled some 170,000 tons of all types of grain and expects shippers to use the proposed rates inasmuch as similar intrastate rates are now utilized in Georgia and North Carolina.

The grain tonnage which the Seaboard hauls makes an important contribution to its freight revenue. In 1960, it moved approximately 104,000 tons of all grains. It ordered 100 jumbo hopper cars and delivery was to have been completed on March 31, 1962. The Seaboard and the Southern serve the same general area and have concurrent service at many points. In fact, they interchange traffic at 47 junction points in the Southeast. During October and November 1961, the Seaboard and the Gainesville Midland Railroad Company, owned by the Seaboard, participated in the movement of 212 cars of grain from various Georgia origins to Gainesville and Oconee Heights, Ga., under intrastate rates at the same level as the rates under investigation. There were 31 multiple-car shipments, averaging approximately 7 cars per shipment. These shipments were loaded mainly in 70- and 90-ton covered hoppers, averaging 90.5 tons of grain per car. The Seaboard maintains that in addition to the proposed multiple-car rates reduced single-car rates are needed.

Other interests supporting respondents.—The North Carolina Utilities Commission demonstrates that in the past the South has consumed a vast amount of grain which has, for the most part, moved at rates considerably higher than those applicable elsewhere in the Nation. It shows that there now exists in the South a multimillion dollar poultry industry which alone consumes a great amount of feed made

from the grains for which the multiple-car rates are proposed. It stresses that the poultry industry does not need milling in transit, and therefore should not be required to pay milling-in-transit rates. It also establishes that livestock producers and the large bakery industry, users of huge amounts of grain, will be benefited if the suspended rates are approved.

The North Carolina State Department of Agriculture points out that that State is a deficit area insofar as grain is concerned. It demonstrates that, while North Carolina consumes a tremendous amount of grain and feed because of its egg and poultry production, it is at a disadvantage competitively as to broiler production due to existing transportation rates. It ranks fourth among the States in broiler production and seventh in egg production.

The Virginia State Department of Agriculture strongly supports the multiple-car rates and looks forward to similar rate relief if these rates are approved. Virginia was a pioneer in the development of the commercial poultry industry, and it is urged that the proposed rates would revitalize this industry, which has been built largely on the conversion of midwestern corn into broilers, turkeys, and eggs. In 1950 Virginia was fifth in broiler production in the United States, but in 1955 it had dropped to eighth place, and by 1960, it was in tenth place.

The Alabama Cattlemen's Association also supports the multiple-car rates. It estimates that by 1975 the United States will need at least 10 million more head of cattle to feed its growing population the same per capita quantity of beef consumed today. This association takes the position that only in the Southeast can the indicated number of cattle be feasibly located. It is emphasized that lower freight rates on feed compounds will result in lower cost to cattle raisers in the Southeast, and eventually reflect lower meat prices to the consumer.

The Georgia Poultry Federation endorses the proposed multiple-car rates. In 1951 Georgia produced 250 million broilers and in 1960, 350 million. It urges that approval of these rates will enable this State to retain its important position in the agricultural economy.

The Louisville Chamber of Commerce supports the proposed rates in its belief that Louisville will be thereby placed on a more competitive basis with the Tennessee River interests. At present, substantial tonnage of grain moves in and out of Louisville by rail. However, it is of the view that private trucking of grain is increasing due to the present relatively higher single-car rail rates.

The Quaker Oats Company, primarily engaged in grain processing, supports these rates. It shows that even without transit it will still be less expensive to bring grain into the South on a multiple-car basis and move it out on a flat rate.

The American Farm Bureau Federation, in supporting these rates, also voiced the hope that the indicated basis will be extended to include single-car shipments. It emphasizes that the cost of rail and truck transportation for moving farm products from farms to market in 1960 was $4.1 billion, which does not include the transportation costs on the supplies, products, and equipment that farmers purchase for production purposes or for consumption, nor does it include local hauling costs.

The Earle Chesterfield Mill Company of Asheville, N.C., manufactures animal feeds, family flour, and table meal. Had its traffic moved in 1960 under the multiple-car rates, it would have effected savings of about $38,000. This figure includes both inbound grain and outbound products. During 1960 it received approximately 36,000 tons of yellow corn, of which 28,500 tons were received by truck and the remainder by rail. This firm also received approximately 1,260 tons of wheat, all by truck, and about 2,000 tons of oats, of which 1,400 tons were received by truck and the remainder by rail.

Most of the above trucked grain originated at country elevators in Indiana, Illinois, and Ohio. For the rail grain, large origin points were Louisville, Ky., Cincinnati, Evansville, and Chattanooga. The truck grain is largely brought in by itinerant truckers on backhauls, who operate in and through this area hauling outbound such exempt commodities as lumber and produce. Its total annual receipts of corn have remained relatively constant in the last 5 years, ranging between 1,100,000 and 1,300,000 bushels. As to corn, it is estimated that transit will be discontinued, and that 75 percent of the inbound movement will come by rail, the remainder by truck. This receiver expects to use the proposed rates on five-car shipments.

Numerous other milling companies in Alabama, North Carolina, South Carolina, Tennessee, and Florida support these rates. Again, for the most part, corn is brought into the South to these companies by unregulated truckers from country elevators in Indiana, Illinois, Ohio, and Iowa, who then transport potatoes, lumber, or other exempt commodities north. These receivers of grain emphasize that the multiple-car rates will result in annual increases of from $15,000 to $140,657 in freight revenue for respondents. One company, a manufacturer of feed, also raises some 5 million broilers each year, and, under the proposed rates, estimates annual savings of $50,000. A Tennessee cooperative expects to save approximately $100,000 annually.

With the proposed rates, these millers and feed dealers foresee a more favorable competitive position throughout their distribution area. They are convinced that unless lower grain rail rates become effective in the South it will spell the end to the poultry business, including both

eggs and broilers, and also to cattle feeding. In the last few years, the poultry business has increased in those States having access to grain moved by barge. The record demonstrates that these concerns will make use of the proposed rates, subject to a minimum of 450 tons per shipment. Each of them testified that transit privileges are not required. No interest was expressed in the proposed rates subject to minima of 900 and 1,800 tons.

About 10 years ago practically all corn moved to these companies by rail. In one instance, some 15 years ago, to Albemarle, N.C., grain moved 70 percent by rail and 30 percent by truck; at the present, grain is received mostly by unregulated truck. Another example of present traffic patterns is the wheat shipments received from the Midwest by Statesville Flour Mills Co., Statesville, N.C., in 1960, amounting to approximately 39,000 tons, of which 22,000 tons were by truck, 15,000 tons by barge-rail, and the remainder of 2,000 tons by all-rail. Sixty percent of this wheat was received at Statesville by truck in 1961, 15 percent was all-rail, and the remainder was ex-barge. This industry intends to ship 100 percent of its midwestern grain in multiple-car lots in the event the proposed rates are approved. The testimony of other feed and milling companies reveals that they expect 75 percent of inbound grain to move by rail in 450-ton lots subject to the multiple-car rates. One company in Florida uses between 200 and 225 tons of corn each month, and it estimated that given the proposed rates, minimum 450 tons, this tonnage could increase by up to 50 percent.

In 1961, a country elevator at Waterloo, Ill., handled approximately 2,429,100 bushels of grain, including 1,193,343 bushels of corn, 52,000 of oats, 636,754 of wheat, 499,300 of soybeans, and 34,420 of other miscellaneous grain. Of the corn, 201,466 bushels were consumed locally, and 75.62 percent of the remainder was sold to itinerant truckers who carried it to the Southeast for resale in Mississippi, Alabama, Florida, and Georgia. Approximately 5.54 percent went by truck to the river houses at East St. Louis, and 18.84 percent moved by rail, predominantly for export.

Of those supporting interests utilizing truck grain, such traffic is handled under the exemption of section 203(b)(6) at rates differentially lower per bushel than the present all-rail rates. As with grain handled by barge under the bulk exemption, rates on truck grain are subject to change without notice.

Briefs of respondent and supporting parties.—The foregoing has been a general evidentiary statement of respondents and those in support. Costs and the extent of truck transportation will be specifically dealt with hereinafter, as will other factual and legal arguments of the parties. The overall position of respondent Southern and supporting interveners, as stated on brief, may be

summed up as follows: It is variously urged that the aluminum hopper cars to be used in conjunction with the Southern's multiple-car rates constitute a major technological advance in railroading; and that the rates at issue are just and reasonable under section 1 as being well above a compensatory level and by comparison with present single-car rates, and are clearly in accord with sections 2, 3, and 15a of the act, the public interest, and the national transportation policy. It is urged that the primary competition to which the involved rates are directed is that by trucks operating under the exemption of section 203(b)(6); that grain will continue to move via barge to Tennessee River ports when the Southern's rates become effective; and that the fully distributed cost comparisons presented by the bargeline protestants are meaningless. It is further asserted that application of the Southern's rates to whole grains only and the lack of transit are entirely lawful; that the opposition of protestant Tennessee Valley Authority is without justification and contrary to public policy; and that the Southeastern Association represents, in fact, large, rather than small, interests who have no right to protection from increased competition.

The United States Department of Agriculture, Virginia interests, and the Southern Governors' Conference and the Southeastern Association of Railroad and Public Utilities Commissioners emphasize that the rates will benefit the southern and southeastern agricultural community. The Department of Agriculture reaffirms its position that the Grain Consuming Animal Unit method (later discussed) of estimating feed grain consumption in the southeastern States is the best method, considering availability of data.

EVIDENCE AND POSITION OF PROTESTANTS

As partially indicated earlier, appearing in opposition to the proposed rates were the bargeline interests, and most of the major primary and secondary grain markets, represented by grain exchanges or boards of trade, including Chicago, Minneapolis, Kansas City, St. Louis, Indianapolis, Hutchinson, Toledo, Fort Worth, and Enid. Also appearing were millers, processors, merchants, the cities of Guntersville and Chattanooga, the Tennessee Valley Authority, and a local labor union of grain milling employees at Minneapolis. A special group of protestants, the Southeastern Association, was organized subsequent to the publication of the rates at issue herein for the specific purpose of voicing objections thereto. It has about 376 members, of which 314 are located in close proximity to the Tennessee River in the States of Alabama and Georgia. As a result of location, the firms, farmers, and feed millers comprising the membership of this association now depend almost entirely upon the

receipt by truck of ex-barge grain. Of the total membership, 68 percent are not located on any railroad and receive their grain by water and truck. As to the remaining 32 percent located on railroads, the record is silent with respect to the volume of grain that is received by them via any mode.

Barge interests.—Particularly vigorous in their attack on the proposed rates are the bargelines and their trade and tariff associations, such as the Waterways Freight Bureau and the American Waterway Operators, Inc. Also participating as protestants were a number of the parent organizations' proprietary carriers discussed below.

The bargelines and barge operating protestants which move waterborne traffic on the Tennessee River as well as the Inland Waterways System fall into the following three general categories.

1. The "regulated" carriers have operating certificates from this Commission. However, because grain may move by barge as an exempt commodity under section 303(b) of the act, carriers without operating authority on the Tennessee River but with authority elsewhere nevertheless may move grain to ports thereon. Such carriers as Federal Barge Lines, Inc., Arrow Transportation Company, Commercial Barge Lines, Igert, Inc., and A. L. Mechling are "regulated" carriers.

2. The "unregulated" carriers are those for-hire bargelines which limit their service to the carriage of exempt bulk commodities. They do not possess certificates of operating authority from this Commission. Mid-American Transportation, Upper Mississippi Towing Co., and Aiple Towing Co. are 3 of over 1,000 such water carriers.

3. The "proprietary" or private carriers are those carriers which are owned, controlled, or operated by interests which are primarily engaged in other industry, but as an incidence thereto establish and retain effective control of water transportation facilities. Firms within this classification are Cargill's Cargo Carriers Incorporated and Central Soya's A. & D. Barge Lines.

Each of the three described categories, however, conducts its barge operations in substantially the same fashion. As an aid to flexibility of operation the various bargelines engage in reciprocal towing, that is, towboats belonging to one company will tow the barges owned by another. Or, if one firm has an insufficient number of loaded barges to complete a full tow, its barges will be added to another company's tow. Also, all three of the above-described types of barging firms engage in interlining barges at fleeting or interchange points.

The intermingling of equipment and interchanging of tows result in a statistical conglomeration whereby it is difficult, if not impossi-

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ble, to ascertain the amount of tonnage moved by "regulated" water carriers as distinguished from the tonnage transported by the barge-lines without operating authority. Notwithstanding the difficulty in arriving at such a determination, it is estimated that in 1959, for example, only 15.9 percent of all the waterborne traffic (all commodities) that moved to Tennessee River ports was transported by "regulated" carriers. It is not possible, because of the absence on the record of reliable evidence, to ascertain whether any grain moved by barge, subject to rates and regulations established pursuant to the provisions of the act, to Tennessee River ports.

One significant factor affecting the competition among the three types of water carriers is the influence of the "proprietary" barge-lines. Both Cargo Carriers and A. & D. Barge Lines maintain a fleet of approximately 100 barges each, and own or operate towboats. When their equipment is not engaged in the transportation of their own property, they perform exempt carriage for others. For instance, Central Soya receives 50 percent of its Tennessee River grain receipts from its own A. & D. Barge Lines. Also, approximately 25 percent of A. & D.'s total barging services are performed for other shippers.

The table below sets forth representative examples of certificated bargeline rates, in cents per ton, published in tariffs lawfully filed with this Commission to and from the points shown thereon, taken from exhibits of record.

Origins	Tennessee River destinations			
	Decatur, Ala.	Guntersville, Ala.	Chattanooga, Tenn.	Knoxville, Tenn.
Upper Mississippi River:				
Cairo, Ill.	226	226	263	337
St. Louis, Mo.	239	239	[illegible]	350
Davenport, Iowa	372	372	409	483
Red Wing, Minn.	452	452	489	563
Minneapolis, Minn.	464	464	501	575
Illinois River:				
Havana, Ill.	289	289	3[illegible]	400
Peoria, Ill.	300	300	3[illegible]	411
Joliet, Ill.	333	333	370	444
Chicago, Ill.	373	373	410	484
Missouri River:				
Jefferson City, Mo.	438	438	4[illegible]	540
Kansas City, Mo.	486	486	522	596
St. Joseph, Mo.	540	540	577	651
Omaha, Nebr.	651	651	688	762
Ohio River:				
Cincinnati, Ohio	306	306	343	417
Louisville, Ky.	[1] 285	[1] 285	[1] 322	[1] 396
	[2] 280	[2] 280	[2] 327	[2] 401
Evansville, Ind.	[3] 211	[3] 211	[3] 248	[3] 322
	[4] 236	[4] 236	[4] 273	[4] 347
Cairo, Ill.	226	226	263	337

[1] Arrow Transportation, Ohio River Company, Union Barge Line Corp.
[2] American Commercial Barge Line Co.
[3] American Commercial Barge Line Co., Mississippi Valley Barge Line Co.
[4] Arrow Transportation, Igert, Ohio River Company, Union Barge Line Corp.

From points on the Missouri, Illinois, and upper Mississippi Rivers, as well as from points on the Minnesota River, to Chattanooga, Decatur, Guntersville, and Knoxville, the present all-barge rates are lower than the combination of the present barge rates from these points to the river crossings under the proposed rates, and the proposed rates therefrom. As an example, the rate on corn and coarse grains from Minneapolis to Chattanooga by barge is 501 cents. Between the same points the combination of barge to St. Louis and the suspended rates beyond to Chattanooga results in a total charge of 508 cents.* The same is true as to the other destinations named. These figures do not include any transfer charges,* which if added, would increase the barge-rail combination.

The record demonstrates that, with the exception of a few qualified and explained divergencies, all barge operators, regardless of whether they are subject to the act, apply the published tariff rates of the certificated carriers. That practice is voluntary, and is not required by law under the exemption of section 303(b).

The barge operators' chief contention is that the Southern grossly overestimates the truck competition into the destination territory and that the real aim of the proposal is to take traffic from them and drive them out of business. In addition, they assert that they are the low-cost mode of transportation, and that the railroads' proposal, under the circumstances of record, constitutes a destructive competitive practice in violation of the national transportation policy.

The matter of possible economic injury to the bargelines is viewed as most serious, not only by them, but by other parties mentioned hereinafter. The bargelines have certain inherent disadvantages in comparison to the railroads. Among these are slower transit time, the need for higher minima, and the hazards of navigation. In addition, they have available to them a much smaller variety of traffic than do the respondents. Grain is held by them to be important. It represents 17.5 percent of all barge traffic and 13 percent of the total traffic of the unregulated bargelines. Of the certificated bargeline protestants, grain is responsible for 27 percent of the revenue of Federal Barge Lines, and 80 percent for Arrow Transportation Company. In 1960, Federal Barge Lines originated 712,642 tons of grain resulting in revenue of $2,347,111. It transported 2,023,188 total tons, producing revenue of $8,684,598. Its grain tonnage was 35.22 percent of its total. In 1956, the barge certificated common carriers, members of Waterways Freight Bureau, had total grain revenue of $8,663,422 as compared to $11,014,491 in 1960. Their total revenues for those years were shown as $86,455,992 and $89,473,766. During 3 years, 1950, 1955, and 1960, Arrow Transportation Company handled 89,246,435,-

* Elevator transfer charges are shown of record to be approximately 75 cents per ton.

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437, and 718,876 tons of grain, respectively, reflecting revenue of $173,752, $1,052,666, and $2,024,879, as compared with total revenue of $350,016, $1,450,465, and $2,510,201.

Tennessee Valley Authority.—The opposition of the Tennessee Valley Authority (TVA) is also based on the fear of the extinction of the Tennessee River bargelines. Such an event, it alleges, would seriously effect TVA's operations and, it maintains, would impede further industrial development of the river valley. Grain constitutes 46 percent of the waterborne traffic on the Tennessee River. Of the $1,180,000 paid by TVA for water transportation services during the fiscal year 1961, carriers with operating authority received 13 percent, or $153,400.

Midwest milling and processing interests.—The main concern of the protesting millers, processors, and elevator operators in the Midwest is that grain will bypass them and move directly to the Mississippi and Ohio River crossings for volume loadings and, as to the millers and processors, that the low rates will make them noncompetitive with mills located in the Southeast. The millers and processors assert that generally 10 percent, and for individual firms up to 25 percent, of their products are now sold in the destination territory. This is true also of the operators in the Southwest and Northwest. The record, however, shows that the principal markets for flour and other grain products are located in areas other than southern territory.

In support of their position, these protestants cite as an example a mill located at Rome, Ga. From Great Bend, Kans., to Rome the present all-rail rate on flour is 111.5 cents per 100 pounds on single-car shipments. If wheat were moved from Great Bend to Rome, applying the suspended rate, minimum 1,800 tons, from St. Louis to Rome, the all-rail combination would be 79.25 cents. However, there is now available to the Rome mill a rate of 74.6 cents made up of the single-car rate of 33 cents (Great Bend to Kansas City) plus the 750-ton barge rate of 26.1 cents to Chattanooga and the single-car rail rate of 10.5 cents to Rome. The record discloses that practically all of the wheat requirements of this mill are supplied by truck from Guntersville or Chattanooga.

The protesting midwestern mills make similar contentions with respect to mills located at Macon, Ga., Chattanooga and Knoxville, Tenn., and Statesville, N.C., based on the volume wheat rates to the mill point and single-car rates on flour beyond. The record reflects that these mills presently have rates lower than would be afforded by the suspended rates. Under current all-rail rates the Macon mill could deliver flour to Albany, Ga., for 2460 cents per ton. Using the suspended 450-ton rate from St. Louis and the present single-car flour rate beyond, the rate would be 1970 cents per ton. On the other hand,

using the existing published single-car rate on wheat to Kansas City, barge to Chattanooga, plus the single-car rate to Macon, the miller could deliver flour at the single-car rate to Albany at a total transportation cost of 1872 cents per ton. Using the same method of transportation the Chattanooga mill can deliver flour milled from Kansas wheat to Georgia points for 2142 cents today.

Also, the mills at Statesville and Knoxville, by the use of rail-barge-rail can deliver flour to the 21 representative points used by the protestants as examples at a total transporation cost lower than the current rail rates presently available to the Kansas mills. For instance, the all-rail rate on flour from Salina, Kans., to Asheville, N.C., is now 2520 cents per ton. The Knoxville mill can deliver flour milled from Kansas wheat to Asheville for 1816 cents per net ton at the present time. The Statesville mill can do so at a cost of 2112 cents per net ton. In some instances, to those selected 21 points, the all-rail rates, applying the suspended rates, would be lower than the combination rates presently available. This is true to nearly all of the destinations with respect to the Statesville mill. The reduction amounts to approximately 100 cents on the average. However, at the present time, using the existing rates, the mill at Statesville has a decided rate advantage over the Kansas mills.

Of the 119 flour mills located in the 7 State territory to which the suspended rates would be applicable, 85 have a daily capacity of less than 400 hundredweight per day. Twenty have a daily capacity ranging from 400 to 800 hundredweight and 14 have a daily capacity of more than 1,000 hundredweight. Their total daily capacity is 59,664 hundredweight as compared with the 59,650 hundredweight daily capacity of the mills of just one of the protestants located in the west. The total daily capacity of the mills located in Kansas City, Mo., is 206,680 hundredweight.

Primary markets.—The primary markets are opposed to the principle of multiple-car grain shipments. They further oppose the rates because of the lack of transit privileges; the failure to absorb switching charges; the application of the reduced 24-hour free time for loading and unloading; and the nonapplication of average demurrage agreements. These interests also insist that the identical rate proposed on wheat should be made applicable to flour. Kansas City, as a separate proposition, contends that the proposed rates would cause its loss of the Memphis gateway. Since its rates would be higher via Memphis, Kansas City expects that grain would flow through St. Louis at lower combination rates, and it would suffer the loss of many customers now served by the alternate route to the south through Memphis.

Transit.—The protestants are divided in their views with respect to the lack of transit provisions in connection with the suspended rates. A number have testified that they have no need for transit. Transit is not now provided with respect to trucked grain, and although a few certificated bargelines publish transit rules, no shippers have testified that they use them. Most of the product of the local mills and processors is consumed in the territory adjacent to them and is mainly delivered by truck. When it is advantageous to them ratewise, however, some of the flour mills and mill feed processors do use transit balances for shipment beyond the mill point. For instance, a mill at Chattanooga which receives 25 percent of its wheat by rail, on the basis of rail wheat brought in through Memphis, can deliver flour to Birmingham and Tuscaloosa at no rate balance, the proportional rates to those points from Memphis being the same as to Chattanooga. On export shipments to New Orleans, La., the same mill receives a refund of 9 cents per hundredweight. As to mill feed, the mills use the transit balances on the ingredients other than wheat, such as gluten feed and cottonseed meal, to obtain rates lower than the local feed rate. One shipment, from Chattanooga to a destination having a local feed rate of 27.5 cents, was actually rated at a transit balance of 18.29 cents.

Briefs of protestants.—Numerous allegations of unlawfulness are made on brief by protestants. They variously assert that the bargelines are the low-cost mode of transportation; that between the important origin and destination areas the barge-rail combination routes are the low-cost routes; and that the proposed all-rail rates are far below fully distributed costs, most of them being below out-of-pocket costs, whereas the present barge rates approximate full costs. It is contended that the proposed rates are directed to grain moving in substantial amounts over the Tennessee River and beyond the ports, and would result in reductions so drastic as to destroy completely the transportation of grain on the river, contrary to the public interest and the national transportation policy. This would purportedly occur since the bargelines, in addition to their service handicaps, are said to be unable to compete at such rates. In support, *New York, N.H. & H.R. Co.* v. *United States*, 199 F. Supp. 635 (D. Conn. 1961), now pending before the Supreme Court, is cited, *inter alia*.

It is also urged that the proposed rates, with no properly related reductions on ex-barge traffic from the Tennessee River ports, violate section 3(4) of the act, contrary to the decisions in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers, Inc.*, v. *United States*, 351 U.S. 56 (1956); and *Arrow Transp. Co.* v. *United States*, *supra*.

It is further urged that protestant bargelines, whether regulated or unregulated, are entitled under the act to protection against unfair

and destructive competitive practices, citing *inter alia*, *James McWilliams Blue Line, Inc.*, v. *United States*, 100 F. Supp. 66 (S.D.N.Y. 1951), *affirmed per curiam*, 342 U.S. 951 (1952), and *Phosphate Rock, Points in Florida to Virginia*, 313 I.C.C. 495, *affirmed*, *Atlantic Coast Line R. Co.* v. *United States*, 209 F. Supp. 157 (S.D. Fla., 1962).

It is also alleged that, in other respects, the rates violate sections 1, 2 and 3(1), and are inconsistent with sections 15a(2) and 15a(3). It is urged that the proposed rates are not compensatory; that they establish an unjust and unreasonable relationship between single-car and multiple-car rates; and that they are unreasonably low compared to first class rates, are lower than necessary to meet barge-rail, barge-truck, and truck competition, and will unnecessarily deplete respondents' grain revenue. In addition, it is contended that the minimum rate, the minimum weight rules, the demurrage rules, the switching provisions, the lack of transit, and the wide range of reductions accorded the selected origins and destinations are unjust, unreasonable, and unduly discriminatory. It is further urged that St. Louis, southern Illinois, Indianapolis, Chattanooga, and Guntersville, and single-car receivers are discriminated against, and suffer undue prejudice; and that feed mills in the Southeast are unduly preferred.

Finally, it is contended that the proposed rates would adversely affect the grain rate structure, and that their further extension elsewhere by the Southern on a similar basis would be unlawful.

The foregoing allegations will be later considered.

TRUCK COMPETITION

Studies of the Southern and protestants.—As earlier mentioned, the Southeast consumes more grain than is produced there and thus is known as a deficit area. The extent of that deficit is an important point of contention and the various methods of calculating it merit full discussion. The Southern submitted a study showing the movement of grain shipped by rail, water, and motor carriers into and out of each southeastern State here involved, plus Virginia and Kentucky. All uses of grain, whether for feed, for human consumption, or for export, require a supply which must be met either by production within the States from present stocks, or by shipment of grain into the States. Although the amount of grain deficit is significant, of even greater importance to this proceeding is the volume of grain transported by the different modes of carriage to overcome the deficit.

The results of Southern's study show that grain shipped into the involved destination area increased from 3,600,000 tons in 1955 to 10,800,000 tons in 1959. For example, in 1955 Alabama is credited with 580,000 tons as compared to 1,902,000 tons in 1959. Increases in the other States for the same period include: Florida, 487,000 to 682,-

000 tons; Georgia, 839,000 to 2,130,000 tons; Kentucky, 425,000 to 1,046,000 tons; Mississippi, 85,000 to 949,000 tons; North Carolina, 76,000 to 881,000 tons; South Carolina, 8,000 to 241,000 tons; Tennessee, 882,00 to 1,563,000 tons; and Virginia, 1,538,000 to 2,049,000 tons.

Of this increase, the motor carriers are shown as acquiring 83 percent, the water carriers 15 percent, and the rails 2 percent. In 1959, the regulated motor carriers are shown as moving only 20,000 tons of grain under the section 203(b)(6) exemption at unknown rates into the considered area while the vast remaining tonnage was transported by motor carriers not otherwise certificated. In 1955 the railroads moved 56 percent of the grain, the water carriers 25 percent, and the motor carriers 19 percent; in 1959 the respective movements were 20, 20, and 60 percent. These figures indicate that the railroads are not sharing in any appreciable extent in the increase in the grain traffic into this deficit area. Thus, the Southern takes the position that the proposed rates are necessary if it is to participate effectively in the grain movement.

In computing the movement of grain by the various modes, the Southern's data for railroads were based on the 1-percent waybill statistics as reported to this Commission. The data on water shipments were gathered from statistics compiled by the United States Army Corps of Engineers through what is known as its vessel operation report. By contrast, no truck operators testified in this proceeding and there is no truck shipping data available. Accordingly, a method was devised to arrive at an estimate of the amount of grain moved by trucks. This statistical method, as used in the study, sometimes called the multiple residual method, was essentially as follows: The total amount of grain utilized or consumed for the years 1955 through 1959, inclusive, was computed for each of the nine States in the Southeast area. The gross amount of grain consumed was determined for various purposes, such as cornmeal milling, wheat flour milling, manufacturing of distilled spirits and malt beverages, seeding, and poultry and livestock feeding. Other uses of grain were added, such as the increase or decrease in the stocks of grain, and the shipments of grain out of the States by rail and water carriers. The next step involves the subtracting of the total production from the total utilization to determine the grain deficit. The grain production in each of these States was computed from reports of the Agricultural Marketing Service of the U.S. Department of Agriculture. The deficit represented a total volume of grain that had to be met by shipments of grain into each State by carriers. The known rail and water carrier shipments into each State were then computed and the total subtracted from the grain deficit to arrive at a balance which had to be met by other carriers, namely motor carriers. It was

pointed out that the derived net motor carrier figures understate the total amount of inbound truck shipments to the extent that the outbound truck shipments have a canceling or balancing effect. Since this is a deficit area, the outbound shipments of grain from a deficit area cannot be expected to be significant.

The amount of feed grain fed to poultry and livestock in the Southeast is the most important item in the analysis of the utilization of grain in this area. Data were available from a number of sources to show all of the needed items of the feed balance except the amount of feed fed to poultry and livestock. This latter amount was calculated by use of the grain consuming animal unit method (G.C.A.U.), developed by the United States Department of Agriculture and described in detail in appendix B. Also, this appendix contains information relating to the feed grains consuming animal unit computations (F.G.C.A.U.) and the North Central Grain Marketing Committee (N.C.M.) studies submitted by protestants.

In the Southern's study, for 1955, 1956, 1957, 1958, and 1959, the total grain utilization data are shown as 17,816,000, 19,900,000, 20,260,000, 22,289,000, and 24,522,000 tons, respectively, which include 14,686,000, 15,239,000, 16,867,000, 18,105,000, and 19,808,000 tons of poultry and livestock feed, computed pursuant to the 1940–45 base period as indicated in appendix B. The total production in this area was subtracted from the total of the utilization data to compute the grain deficit. The known movements by rail and water were then subtracted from this deficit. It was on this basis that the Southern's witnesses show the derived motor movement of grain into the Southeast under the so-called multiple residual method. For 1955, 1956, 1957, 1958, and 1959, the derived motor movement of grain is computed as 695,000, 2,947,000, 4,779,000, 3,776,000, and 6,624,000 tons, respectively.

By stipulation of counsel for the Department of Agriculture and protestant Central Soya, using the base period of 1955–59, the total national disappearance, charged to the feeding of poultry and livestock, of feed grains (corn as grain, sorghum grains, oats and barley but excluding corn in silage, for forage, and hogged off), for crop years 1955–56, 1956–57, 1957–58, 1958–59, and 1959–60 amounted to 95,900,000, 93,600,000, 101,500,000, 110,700,000, and 115,800,000 tons, respectively. These tonnages were divided by grain consuming animal units (concentrate consuming) of 122,000,000, 118,900,000, 117,300,000, 123,000,000, and 121,400,000 (units) to reflect feeding rates for the above respective periods of 0.786, 0.787, 0.865, 0.900, and 0.954 ton. The total animal units for the involved States, as adjusted, included 17,486,000, 17,830,000, 18,035,000, 18,608,000, and 19,215,000, and these units multiplied by the above feeding rate factors reflect

feed grains fed of 13,744,000, 14,032,000, 15,600,000, 16,747,000, and 18,331,000 tons. As explained in appendix B, an animal unit is simply a convenient statistical tool representing a composite of all animals and poultry, not any single type thereof. Also, the various base periods and feeding rates are discussed fully therein.

The Southern compares these figures with feed grains as computed under the 1940–45 base period for 1955, 1956, 1957, 1958, and 1959, respectively. Under the 1940–45 base period the feeding rates were computed as 0.580, 0.581, 0.634, 0.660, and 0.699 ton, and the respective total utilization for these years, as previously noted, were 17,816,000, 19,900,000, 20,260,000, 22,289,000, and 24,522,000 tons. It demonstrates that both these base periods reflect the same general area or level of feed consumption. Although it used the later period, the Southern emphasizes that an accurate analysis of feed consumption in the considered area, using the G.C.A.U. method with the base period changed to 1955–59, is not possible because of the lack of State factors for such a period.

According to the protestants, there are two other formulas for the statistical computing of grains fed to livestock and poultry in determining grain deficits in a given area. They are: (1) grain consumption based on feed per head of livestock or poultry produced or fed in the area, and (2) grain consumption based on feed requirements for a given quantity of livestock products, for example, per 100 pounds of milk. The key figure in the computation of deficits is the total utilization. Crucial to the determination of this figure is the estimate of the grains fed to poultry and livestock.

The economic and statistical witnesses for the protestants point out that under the multiple residual method any error in basic data, procedures, or calculations automatically shifts to the net motor inshipment figure. This would be true as to any statistical computation. The protestants' witnesses assert that such errors had been committed by the Southern.

Before discussing the alleged errors, it is again noted that the multiple residual method is based on data of the Department of Agriculture, is employed by that Department in determining grain deficits, and has been used by it for years, and as late as 1960. The formula has not been used by the Department beyond the estimation of a deficit. It has here been extended beyond that point by both the protestants and the respondents to determine the division among water carriers, railroads, and trucks in the transportation of grains necessary to meet the deficit.

One of the errors made by the Southern, according to the protestants, was the calculation of the grain consuming animal units on a 1940–45 base, except for broilers which were calculated on a 1953–55

base. This, argue the protestants, means that the formula rests upon an outdated animal population. This base is currently being updated by the Department of Agriculture to a 1955–59 basis but the updating has not been completed. As indicated, the base has been employed by the Department of Agriculture as late as 1960 and, in our opinion, merits use in this proceeding.

The second alleged error was the failure of the Southern's witnesses properly to match shipments, crop years, and livestock years. Calendar year 1959 rail and water shipments were used to match with the 1959–60 livestock year. The latter was from October 1, 1959, to September 30, 1960. The next alleged error relates to the computation of net changes in stocks of grain. This consisted in the use in some instances of preliminary stock figures instead of the revised figures. Another alleged error was the mismatch of livestock feeding years with crop marketing years, calendar years, and fiscal years. Of these, the major and most serious, according to the protestants was the use of the 1959 calendar year shipments with the 1959–60 livestock year.

The protestants' witnesses recognize, although they insist that the proper shipment year was the calendar year 1960, that it would be quite impossible to feed to livestock and poultry in the fall and winter of 1959 and early 1960, the grains harvested in the summer or fall of 1960. In the surplus area, harvest of the various grains commences generally in July and extends through October and November. In the Southeast, because of the climate, the harvest is earlier. It is not the practice of farmers to purchase feed until their own product has been consumed. Although the livestock year commences October 1, 1959, in all probability, feed would not be purchased until new harvest shipments from the surplus area are begun. The necessity to purchase would then continue until the local harvest in the late spring or early summer of 1960. On this basis it is apparent that the employment of the calendar year 1959 shipments, as was done by the Southern, was appropriate. However, to satisfy the criticisms, the Southern's witness, on rebuttal, revised the computations employing shipments for the last quarter of 1959 and the first three quarters of 1960 and came up with approximately the same result for 1959 shipments: 10,233,000 tons as compared with the original figure of 10,800,000 tons. The other alleged errors were not pressed by the protestants and need not be further discussed.

The protestants, using the same basic data and the residual method employed by the respondents, submitted their own calculations. In doing so, they attempted to correct the alleged errors. However, in computing the amount of grain consumed by livestock and poultry, they disregarded the grain (concentrates) consuming animal unit method and turned to grain consumption based on feed per head of

livestock or poultry produced or fed, one of the approaches mentioned above.

In so doing, the protestants employed an estimated number of actual livestock produced or fed in each State and feed consumed per head, taking into account the exact composition of the livestock population in each of the southern States concerned. Feed consumption was then based on the requirements for each type of livestock produced. The requirements for each species in the 1955–59 period were based on the national averages although it is claimed by the protestants that those averages do not reflect feed consumption in the Southeast.

When the national averages are used, the protestants assert that four assumptions are implicit therein. They are, first, that grass in pasture in the Southeast is of the same relative importance to feed grains in meeting total feed requirements as is the average of the United States. This, they say, results in an overstatement since grass in pasture constitutes more than the national average proportion of diet in the Southeast. Second, they allege that grain lost through shrinkage, waste, damage from grain pests such as rodents and insects, and for other reasons, is considered as actually fed to livestock. This, it is asserted, also results in an overstatement. Third, they allege that the rate of production per head of livestock and poultry is the same in the Southeast as the average for the United States. In fact, they say, the rate of production is lower. Fourth, they contend that the national average of the concentrate ration is the same in the Southeast. Again, it is alleged that this results in an overstatement since in the Southeast feed grains represent a smaller proportion of the total concentrate ration. The element of loss or waste was stated as included in the factors which reflect the feeding rate. Even including the alleged overstatement, the protestants' witnesses adduce a net motor in-shipment of less than 2 million tons per year as compared with the over 6 million figure arrived at by the Southern.

Any one of the three methods for computing livestock and poultry feed as part of the deficit, it is contended by protestants, should reach a result comparable with that produced by the other two. That did not occur here.

The Southern emphasizes that the figure, revised on rebuttal, of 10,233,000 tons for 1959, among other things, does not represent its estimate of the grain shipments. Such data were prepared and submitted to illustrate the impact of two contentions made by the protestants. The first contention has to do with the matching of the years, and the second with the appropriate date when inventories of stocks should be taken into account, particularly the stocks of small grains. In meeting these contentions the Southern on rebuttal ad-

justed the data to an October–September crop year basis, and for the net changes in stock they used October 1 for corn and sorghum grains, and July 1 for the small grains, wheat, oats, barley, and rye. It was on this basis that it computed total utilization as 18,969,000, 19,302,000, 20,901,000, 22,700,000, and 23,972,000 tons for the crop years of 1955–56, 1956–57, 1957–58, 1958–59, and 1959–60, respectively. From these data the production for these years of 14,215,000, 14,296,000, 11,939,000, 13,808,000, and 13,739,000 tons were subtracted reflecting grain deficits of 4,754,000, 5,006,000, 8,962,000, 8,892,000, and 10,233,000 tons. The known rail and water movements were then subtracted resulting in derived motor movements of 2,034,000, 1,686,000, 4,547,000, 4,596,000, and 5,659,000 tons.

On cross-examination of a Southern witness, the protestants submitted various recalculations of estimates of feed grains fed to poultry and livestock in the involved States on various bases and at various feeding rates. However, they assert that none of these estimates are sufficiently accurate to permit the use thereof in deriving the approximate tonnages which moved into the limited region involved by motor vehicle. In fact, the stated purpose of these estimates is to illustrate the widely different tonnages for in-shipments by motor vehicles which are produced as residuals when varying sets of assumptions believed to be logical are supplied in the method used by the respondents. The protestants further contend that any acceptable animal unit approach to estimating tonnages of feed grains fed to poultry and livestock within a limited region involves such a large degree of probable error as to deprive of validity the calculated residuals which purport to represent in-shipments by motor vehicle.

Criticism is made by protestants of the Grain Consuming Animal Unit basis which is predicated on relationships of feeding rates of concentrates when the purpose is to estimate the consumption of feed grains by the particular population mix in the involved territory. The protestants argue that the relationship between the various classes of poultry and livestock used to derive animal units should reflect their consumption of feed grain rather than concentrates. They also take the position that a basic deficiency in any estimate of feed grain consumption within a limited area based on the so-called feed balancing method or the multiple residual approach lies in the fact that total production data for feed grains, both for the United States and for the States here involved, are estimates. Moreover, they assert that the livestock population in a particular feeding year, both for the United States and for the involved States, are estimates, and that the feed grain disappearance treated on a national basis as fed to livestock and poultry is itself a residual.

In their rebuttal, the Southern submits what it terms its final estimation of grain shipments into, within, and out of the Southeast. In this estimation it used later data when available and added the year 1960. It is pointed out that the matching of these data by years is a matter of judgment, a subject on which reasonable men may differ. It explains that to claim exact "rightness" or "wrongness" when crop years, shipment years, and consumption years do not coincide is to claim a degree of precision that is unwarranted.

In this final summation it computes total utilization for 1955, 1956, 1957, 1958, 1959, and 1960 as 17,861,000, 19,868,000, 20,218,000, 22,300,000, 24,458,000, and 24,404,000 tons, respectively. Subtracting production figures of 14,215,000, 14,296,000, 11,939,000, 13,808,000, 13,739,000, and 13,458,000 tons results in grain deficits of 3,646,000, 5,572,000, 8,279,000, 8,492,000, 10,719,000, and 10,946,000 tons. It is on this basis, using the feeding year beginning October 1 of the year shown and matched with the net changes in stock occurring during the preceding 12 months, that the Southern arrives at the derived motor shipments of 740,000, 2,915,000, 4,737,000, 3,787,000, 6,560,000, and 6,233,000 tons for these years. If the net changes in stocks are for 12 months coinciding with feeding year, October 1 to September 30, the Southern computes the derived motor shipments as 1,724,000, 1,333,000, 5,540,000, 4,307,000, 5,809,000, and 6,956,000 tons for the same years. In the net changes in stocks, if July 1 is substituted for October 1 for small grains (oats, barley, wheat, and rye) the derived motor shipments would be 1,409,000, 2,087,000, 5,436,000, 4,166,000, 5,924,000, and 6,792,000 tons. On the above basis, the Southern stresses that whatever the pattern of matching years and correlation of net changes in stocks, the derived motor shipments into the Southeast are large in volume and substantially accelerating.

While the details of both methods of approximating the derived motor carrier tonnage into the Southeast, namely, the Southern's grain consuming animal units (G.C.A.U.) and the protestants' feed grain consuming animal units (F.G.C.A.U.), are subject to possible imperfections, as is true of most statistical analyses, nevertheless we are of the opinion that both should be evaluated for the purpose of determining the extent to which unregulated trucks are transporting grain. The N.C.M. studies are not pressed by protestants. In the interest of focusing attention on the results of the two plans, there follows a simplified table including all the important factors, taken from exhibits of record, used to obtain the inbound derived truck tonnage. The Southern's figures are principally for the calendar years 1960 and 1956, with exceptions as noted, while those offered by protestants reflect the crop years, October–September, 1959–60 and 1955–56.

Utilization, production, and movement of grain, into and out of the Southeast

[Thousands of tons]

	1960 Southern	1960-61 (crop year) Protestants				1966 Southern	1965-66 (crop year) Protestants			
	(A)	(B)	(C)	(D)	(E)	(A)	(B)	(C)	(D)	(E)
Utilization:										
1. Consumption:										
Corn meal milling	[a] 500	497	497	497	497	[a] 547	546	546	546	546
Wheat flour milling	[a] 753	736	736	736	736	[a] 747	751	751	751	751
Distilled spirits and beer	[a] 525	555	555	555	555	[a] 471	486	486	486	486
Seed	[a] 289	281	281	281	281	[a] 394	396	396	396	396
Poultry and livestock feed	[b] 20, 327	17, 627	16, 199	15, 413	18, 002	[b] 15, 249	13, 478	13, 478	12, 911	12, 778
2. Other:										
Net changes in stock	[b] [a] (408)	[b] (293)	[b] (293)	[b] (293)	[b] (293)	[a] 602	287	287	287	287
Shipments out:										
Rail	[a] 134	180	180	180	180	[a] 329	290	290	290	290
Water	[a] 2, 304	2, 240	2, 240	2, 240	2, 240	[a] 1, 828	1, 456	1, 456	1, 456	1, 456
Total utilization	24, 404	21, 903	20, 365	19, 579	19, 186	19, 868	17, 698	17, 698	17, 121	16, 698
Production	[a] 13, 458	13, 739	13, 739	13, 739	13, 739	[a] 14, 296	14, 216	14, 216	14, 216	14, 216
Grain deficit	10, 946	8, 264	6, 626	5, 840	5, 429	5, 572	3, 473	3, 473	2, 906	2, 473
Shipments in—										
1. Known:										
Rail	[a] 2, 456	2, 280	2, 280	2, 280	2, 280	[a] 1, 937	1, 963	1, 963	1, 963	1, 963
Water	[a] 2, 287	2, 194	2, 194	2, 194	2, 194	[a] 720	767	767	767	767
2. Derived Motor	6, 233	3, 690	2, 052	1, 366	956	2, 915	743	743	186	[b] (247)

[b] Parentheses indicate negative figure.

A. Southern's revised calculation of the derived motor shipments into the Southeast for 1960 and 1966, under the G.C.A.U. method, which omits the milk cow adjustment, and includes the items of "waste" and "other livestock." 12 months' period embraced in year shown in column heading (using 1960 as example) are: [a] Calendar 1960 (except distilled spirits and beer, July 1, 1960, to June 30, 1961). [b] Oct. 1, 1960, to Sept. 30, 1961. [c] Oct. 1, 1960, to Oct. 1, 1960. [d] Oct. 1, 1960, to Sept. 30, 1961, for corn and sorghum, July 1, 1960, to June 30, 1961, for other grains.

B. Protestants' calculation of the derived motor shipments into the Southeast utilizing the following:

1. Use of data adjusted to an October–September crop year basis.
2. Substituting the F.G.C.A.U. method in place of the G.C.A.U.
3. Including "waste" and "other livestock."
4. No milk cow adjustment.

C. Protestants' calculation of the derived motor shipments into the Southeast utilizing the following:

1. Use of data adjusted to an October–September crop year basis.
2. Substituting the F.G.C.A.U. method in place of the G.C.A.U.
3. Excluding "waste" but including "other livestock."
4. No milk cow adjustment.

D. Protestants' calculation of the derived motor shipments into the Southeast utilizing the following:

1. Use of data adjusted to an October–September crop year basis.
2. Substituting the F.G.C.A.U. method in place of the G.C.A.U.
3. Excluding "waste" and "other livestock."
4. No milk cow adjustment.

E. Protestants' calculation of the derived motor shipments into the Southeast utilizing the following:

1. Use of data adjusted to an October–September crop year basis.
2. Substituting the F.G.C.A.U. method in place of the G.C.A.U.
3. Excluding "waste" and "other livestock."
4. With a milk cow adjustment.

Also of importance is the definite trend upward of unregulated truck tonnage during the period covered by the G.C.A.U. (calendar year) and the F.G.C.A.U. (crop year) statistical approaches, summarized with other data, in the following table:

Year	Estimated grain tonnage into the Southeast			
	Southern G.C.A.U.	Protestants F.G.C.A.U.	Rail 1 per-cent waybill study	Barge Army Engineer
1955	740,000	753,000	1,999,000	997,000
1956	2,915,000	305,000	1,937,000	720,000
1957	4,737,000	2,993,000	2,215,000	1,327,000
1958	3,787,000	2,744,000	2,669,000	2,036,000
1959	6,569,000	3,889,000	2,154,000	2,005,000
1960	6,233,000		2,456,000	2,257,000

Appendix C hereto includes an analysis of soybean data showing that shipments of this commodity have increased more than one million tons per year during the 1955–59 period. A limited number of States accounted for most soybean consumption and production in 1959. Thus, as detailed in appendix C, changes in soybean consumption, production, and transportation have been concentrated in only a few southeastern States.

Also, in appendix C the results of a study undertaken by the Southern are shown in the estimation of inter-regional receipts of raw grain plus soybeans for domestic uses only. In 1959, under this study in the involved area, it was determined that total receipts of grain and soybeans for all uses, including export, aggregated 6,659,000, 2,308,000, and 3,025,000 tons for motor, water, and rail, respectively. As noted in appendix C, the protestants show motor shipments into the Southeast of 1,889,000 tons as compared to 6,569,000 tons by the Southern.

In appendix D, the results of a statistical sample of approximately 19 percent of all of the grain users in the Southeast are detailed showing grain movements to be anticipated by the Southern under the proposed multiple-car rates. The study was made in October 1961, and the anticipated rail terminations, based on the sample, and assuming multiple carload grain rates were available in 1960, total 438,642 tons. While this figure is even lower than estimates of motor inbound shipments, as computed by the protestants, the recapture of that volume from unregulated truckers would be significant.

Georgia commission study.—In 1961, the Georgia Public Service Commission, with seven other southern States, conducted a 2-day survey, which reflected the movement of grain by motor vehicle into the South. Round-the-clock road checks were made at 45 points, which revealed that almost 4,000 tons of grain moved by truck. The

results of this survey, which is detailed in appendix E, indicate that the movement of whole grains by truck in and to the South is large in volume and widespread as to carriers, origins, and destinations.

Discussion and conclusions.—Considerable reliance has been placed by the Southern on the intricate statistical procedure described as the grain (concentrate) consuming animal unit method (G.C.A.U.). That system should be accorded weight and probative value. It has been used for many years by the Department of Agriculture in numerous statistical bulletins, issued for public information, and as a means of estimating grain deficits. The results of that method also have been used by other agencies of the Federal Government such as the Office of Civilian Defense Mobilization, as well as by the American Feed Manufacturers Association for industrial purposes.

The protestants, on the other hand, have introduced exhibits purporting to develop a new method of statistical analysis termed by them feed grain consuming animal unit (F.G.C.A.U.), a method not utilized by anyone but protestants. Counsel for protestants takes the position that neither the G.C.A.U. nor their F.G.C.A.U. method is sufficiently accurate to estimate the volume of inbound truck grain.

The history of the G.C.A.U. method of estimating grain deficits, we believe, is sufficiently reliable to approximate the volume of truck shipments into the Southeast. The Department of Agriculture emphasizes on brief that the G.C.A.U. method is the best method, considering availability of data, to use to estimate feed grain consumption in the southeastern States. While both sides freely concede that the ultimate figures resulting from the use of the two statistical approaches are, at best, approximations,* the evidence is enough to hold, as we do, that on this record, considering also the demonstrated trends, the actual volume of grain shipments in 1960, including soybeans, transported by unregulated trucks was from about 4 to substantially in excess of 6 million tons, and in view of the Department of Agriculture method, which we find of greater reliability, much more likely nearer the latter figure. Such tonnage greatly exceeds the volume of grain carried by either railroads or bargelines into the Southeast.

Moreover, considering also the results of the 2-day eight-State road check, shipper and receiver testimony concerning their use of trucks, and the rates already in existence in an effort to meet truck competition, the conclusion is compelled, and we so find, that unregulated truck transportation of grain is the most substantial and growing competition facing respondents.

* It is here observed that protestants' calculation, previously shown, of a deficit derived motor carrier shipment figure of 247,000 tons for crop year 1955–56, does not appear possible.

COSTS

The Southern submitted a detailed study pertaining to costs of moving grain in shipments of five jumbo cars each. Protestant barge-lines introduced cost evidence relative to rail and barge movements of grain. Studies of a more general nature were also introduced by the Louisville & Nashville and the A. L. Mechling Barge Lines, Inc.

Rail cost studies.—The cost studies by the Southern and protestants concerning multiple jumbo car shipments of grain are discussed in detail in appendix F. Our agreements or disagreements with various aspects of such studies are also contained in that appendix and form the basis for our restatement of rail costs for multiple jumbo car movements by the Southern. The following table contains our restatement of the Southern's out-of-pocket costs, at the proposed

Out-of-pocket costs and proposed rates in cents per net ton for transportation of grain in 5-car shipments of jumbo hopper cars, minimum weight 450 tons, over Southern Railway System routes, from and to points named in suspended schedules

Destinations	Origins									
	St. Louis		Evansville		Louisville		Cincinnati		Memphis	
	A	B	A	B	A	B	A	B	A	B
Alabama:										
Birmingham	337	312	308	287	229	207	220	217	183	240
Selma	391	361	360	333	273	253	264	273	208	240
Tuscaloosa	363	318	331	308	284	268	261	240	180	240
Florida:										
Palatka	526	561	488	512	418	512	420	526	418	444
F xx7	481	519	482	484	378	484	384	478	378	393
Georgia:										
Atlanta	341	288	310	268	283	238	244	211	233	231
Bowman	424	449	368	360	316	300	327	374	318	341
Chamblee	380	366	318	298	242	298	258	311	241	282
Columbus	419	404	388	358	311	358	322	373	311	281
Dalton	297	331	268	243	189	243	200	248	189	243
Flowery Branch	369	408	336	319	261	319	272	333	260	299
Fort Valley	418	444	367	368	310	338	320	371	309	318
Gainesville	375	417	344	328	267	328	278	342	267	308
Macon	370	440	346	361	271	341	282	365	271	327
Paradise Valley	408	428	378	330	300	330	310	353	299	319
Rome	313	346	282	288	208	288	216	279	204	256
Royston	419	449	388	360	311	360	322	374	311	341
North Carolina:										
Albemarle	399	519	367	436	291	367	301	370	348	438
Asheville	323	420	291	338	214	289	224	278	263	358
Charlotte	301	502	280	418	253	350	264	349	336	428
Durham	421	560	360	477	313	409	324	370	357	408
Goldsboro	454	603	423	520	346	432	357	412	400	538
Hoskinsville	363	494	331	458	274	343	285	351	329	432
Mount Airy	417	541	398	411	309	360	320	364	363	479
North Wilkesboro	438	569	407	478	330	408	340	382	394	497
Raleigh	432	575	401	492	334	434	334	353	378	513
Rural Hall	398	518	367	433	300	365	301	351	344	458
Statesville	389	498	337	408	280	335	271	343	318	424
Winston-Salem	390	516	359	433	282	365	293	351	336	458
South Carolina:										
Columbia	388	514	357	429	280	308	291	371	334	412
Leesville	407	480	376	429	299	362	309	360	353	413
Spartanburg	349	527	318	438	241	361	252	400	295	422
Orangeburg	419	514	388	377	271	381	322	317	365	395
Summerville	448	539	418	448	338	413	349	422	392	434
Tennessee:										
Chattanooga	282	310	241	240	175	240	185	240	173	240
Knoxville	274	347	248	264	166	240	177	240	220	255
Johnson City	313	308	278	313	207	247	217	233	261	348

A—Out-of-pocket costs. B—Proposed rates.

minimum weight of 450 tons, and a comparison of such costs with the proposed rates. An analysis of that table shows that of the 185 instances in only 20, over 1 route from Memphis, 4 routes from St. Louis, and 15 routes from Evansville, would the out-of-pocket costs, as restated, exceed the revenues. The average relation of revenue to cost for all of the many routes shown would be 118 percent.[10] The costs of the Southern for the 450-ton movements between the Florida and Georgia points involved are not shown, but those rates are constructed on the same scale as the others and appear to follow the above pattern. These latter rates could have but little, if any, effect on protestants.

The Southern and the protestants did not submit specific costs for the 10- and 20-car multiple shipments which the Southern proposes to transport at rates lower than those applicable on 5-car shipments. However, in developing their revenue-cost comparisons for the anticipated traffic those parties reduced anticipated revenues by $11,107 based on a forecast of 110,170 tons in 10-car shipments. There is no reliable evidence that 10 or 20 jumbo-car multiple shipments would be available for movement. Moreover, there is the likelihood of an increase in the switching costs for those larger consignments at origins, destinations, and intermediate yards.

The study submitted by Louisville & Nashville purports to show the relative cost of transporting grain in jumbo cars and standard boxcars. It is based on southern region data as shown in I.C.C. Statement No. 5–60, Rail Carload Cost Scales by Territories for the Year 1959, with the following adjustments. The depreciation expense and return on investment were shown on two bases: (1) These expenses for the covered hopper cars were adjusted to reflect the higher costs for such cars as compared with the territorial average cost; and (2) the depreciation and return both for jumbo and standard boxcars were adjusted to reflect reproduction costs (present-day values). Switching and station clerical expenses were adjusted on the basis of a time study made at Louisville. Adjustments applying to boxcars only were made for grain doors and cleaning expenses. Freight-train car expenses were adjusted to reflect tariff provisions calling for 1-day loading and unloading. In this study jumbo cars for shipments of 450 tons are said to have a cost advantage up to 100 miles when depreciation and return on investment are considered on the basis of original cost, while beyond that distance the advantage is with the standard boxcar. When depreciation and return on investment are based on reproduction costs, the study states that the jumbo cars have a cost advantage up to approximately 415 miles. Comparable results were obtained

[10] The average relation would increase to 125 percent for the 500-net ton shipments contemplated by the Southern. See appendix F.

for the 900- and 1,800-ton shipments. The study, as presented, gave only final results and the validity of the procedures followed in making the various adjustments cannot be substantiated or the results verified.

Protestant bargelines also develop out-of-pocket and fully distributed southern region costs for jumbo cars, regular covered hopper cars, and boxcars. These costs, used to make intermodal cost comparisons and revenue-to-cost comparisons, are for five-car multiple shipments, in jumbo cars, of 450 tons and 500 tons, and for nine-car multiple shipments, in regular covered hopper cars and boxcars, of 450 tons, between points over other than Southern Railway System routes. In computing southern region costs the protestants followed Rail Form A with adjustments similar to those they used in developing Southern Railway System costs. As to the application of southern region costs to jumbo cars for movements over other than the Southern's routes, comment thereon is unnecessary since the other respondents do not propose to perform service under the rates at issue in such equipment.

With respect to the showing by protestants of southern region costs for regular covered hopper cars and boxcars, we are of the opinion that the costs shown are reasonably representative of costs in that region. In the following table are shown movements of grain in consignments of 50 tons per regular covered hopper car or boxcar and 450 tons per shipment, over tariff routes other than those in the Southern Railway System, on which revenues at the proposed multiple-car rates would exceed, equal, or fail to meet southern region out-of-pocket and fully distributed costs. Also shown in the table are the average percent relations of revenues to costs for such movements.

	Number of routes with revenue equal to or above costs		Number of routes with revenue less than costs		Average percent relation of revenue to costs	
	Out of pocket	Fully distributed	Out of pocket	Fully distributed	Out of pocket	Fully distributed
Hopper car [1]	21	3	1,312	1,330	66	44
Boxcar [1]	172	4	1,161	1,329	83	51
Hopper car [2]	19	5	125	139	68	46
Boxcar [2]	37	8	107	136	85	53

[1] From Memphis, St. Louis, Cairo, Metropolis, Evansville, Louisville, Cincinnati.
[2] From Guntersville, Chattanooga, Knoxville.

Other than the Southern, none of the respondents has proffered specific costs concerning movement of grain on their respective lines. In the circumstances, and in view of protestants' last-mentioned cost showing for regular hopper cars and boxcars, it is apparent that the proposed rates for the individual respondents other than the Southern are not shown to be compensatory.

Barge cost studies.—Six of the bargeline protestants joined in the introduction of a study showing the fully distributed costs of transporting grain in standard and jumbo covered hopper barges from St. Louis and Evansville to Memphis, Guntersville, Chattanooga, and Knoxville. The sponsoring carriers are Federal Barge Lines, Inc.; American Commercial Barge Line Company (including Blaske, Inc.); Mississippi Valley Barge Line Company; Union Barge Line Corporation; Arrow Transportation Company; and Igert, Inc. The study was developed so that the fully distributed costs of barge and barge-rail movements could be compared with such costs for rail shipments of grain between the same points.

The following table compares such costs with barge rates for representative movements of grain.

	Fully distributed cost per ton—weighted average [1]	Rate per ton
From St. Louis to—		
Guntersville	$2.48	$2.39
Chattanooga	3.84	3.75
Knoxville	3.[illegible]	3.50
Memphis	1.[illegible]6	1.86
From Evansville and other lower Ohio River ports to—		
Guntersville	2.13	2.11
Chattanooga	3.45	3.45
Knoxville	3.11	3.22
Memphis	1.82	1.86

[1] Weighted on basis of total movement, standard barges, 874,287 tons, or 16 percent; jumbo barges, 1,[illegible] tons, or 84 percent.

A barge cost study introduced by A. L. Mechling Barge Lines, Inc., was based on its operations in 1961. This bargeline does not maintain detailed costs concerning barges as a matter of regular office procedure, but was able to develop certain basic information. Detailed records covering port expenses were not available. Lacking records for costfinding purposes, Mechling relied on cost and statistical imputations from the cost study submitted herein by other barglines. In so doing, certain barge costs, performance factors, and other data not only embraced combined information for six barge carriers but was based on a different year; namely, 1960. Port expenses of Arrow were brought into Mechling's study, and no research of the average bargeload of grain originated at the involved river crossings was made by Mechling. These deficiencies in the study prepared by Mechling are substantial and warrant the conclusion that the study is not reliably representative of either the grain traffic in general, or Mechling's grain transportation in particular.

Respondents did not restate the barge cost study of the six protestants but did submit numerous criticisms thereof. The gist of these

criticisms is that the study is based on general averages, combines unlike data of the carriers studied, resorts to unfounded imputations, and fails to measure properly the cost of the grain traffic. The Southern also attaches importance to the refusal by the bargelines to provide a sample of requested documents, such as barge history cards and towboat logs, to test the accuracy of the barge cost study. We have examined these criticisms of protestants' costing methods, the charges concerning inadequate data, and the other contentions, and conclude that while some of these criticisms may have merit, on an overall basis, they have little significant impact on the barge cost study. However, there are other issues raised which we consider to have a vital effect on the use of barge costs for the purpose of making intermodal cost comparisons between rail and barge or barge-rail transportation. These questions concern the amount of "public costs" assignable to barge transportation and the use of fully distributed costs for intermodal cost comparisons.

As to the matter of "public costs" of barge transportation, the Southern gathered certain data in an effort to determine the portion of public investment and maintenance costs which might properly be assignable to barge transportation on the various segments of the Mississippi River system and the Tennessee River. For the Mississippi River system, investment and maintenance costs were necessarily allocated on an arbitrary basis since a detailed breakdown of these costs was not available, and no study had been made to determine the actual beneficiaries of these expenditures. Concerning the Tennessee River, even though records kept by the Tennessee Valley Authority permitted some breakdown of various cost factors, such as navigation, flood control, and recreation, and the Southern gave consideration to Army Corps of Engineers expenses for operation and maintenance of channels and navigation structures, and to U.S. Coast Guard expenses for placing and maintaining aids to navigation, the allocations were also necessarily arbitrary for much the same reasons as indicated for allocation of public costs on the Mississippi River system. "Public costs" per net ton as shown by the Southern are set out in the following table.

"Public costs" per net ton for movements from river crossings to Tennessee River ports

Destination	Origins			
	St. Louis	Evansville	Louisville	Cincinnati
Decatur	$2.55	$2.40	$2.85	$2.28
Guntersville	2.94	2.79	3.04	3.21
Chattanooga	3.72	3.57	3.82	3.99
Knoxville	5.03	4.90	5.15	5.32

The "public cost" evidence here presented raises an issue of much significance. The Commission adheres to the national transportation policy principle that this country's several forms of transportation should be treated fairly and impartially and that no one form should be unduly preferred. However, Congress has seen fit to accord funds to effect the indicated public improvements. In determining merely the reasonableness of the level of particular rates to be charged shippers by water carriers, the Commission has never considered, as a cost factor, any expenditures of public funds directed and appropriated by the Congress. Nevertheless, it is manifest that in competitive ratemaking where one mode does assert the inherent advantage of low cost in performing a service, sound economics plainly require that all costs, including "public costs," which go to make up the asserted inherent advantage must, in all justice, be considered. As we understand the term "inherent," it can have no reference other than to permanent, essential, intrinsic characteristics. That an allocation of "public costs" is a factor to be considered in determining whether an inherent advantage exists is clear, and we so find. As indicated, the relation of these "public costs" for barge transportation submitted by the Southern to the grain traffic moved by bargelines here involved is not clearly demonstrated. Undoubtedly, there are many beneficiaries of these public expenditures other than the barge industry. While the Southern's "public costs" study is deficient, we cannot find that protestants have the inherent advantage of low cost since their showing fails to consider the significant matter of an allocation of "public costs" to their operations.

In intermode competitive rate proceedings, fully distributed cost comparisons have been utilized heretofore in determining the low-cost mode of transportation in order to afford the public the inherent advantage of such service. Such costs comprise the sum of the out-of-pocket expenses plus an apportionment of the constant expenses. Protestants applied the ton and ton-mile method of allocating constant costs, used in Rail Form A and generally followed, to develop rail full costs. Applying this method to our restatement of the out-of-pocket costs, it is apparent that none of the rail rates return fully distributed costs. Protestants also introduced barge fully distributed costs based on an allocation which has the effect of treating constant costs as a percentage additive to the directly assigned costs.

On a comparative basis, utilizing the fully distributed cost figures presented by protestants, but with "public costs" aside, the barge routes would be the low-cost mode from St. Louis, East St. Louis, and Evansville to Chattanooga and Knoxville. Similarly, comparing, for example, all-rail movements via the Southern from elevators on its lines at East St. Louis and Evansville and from elevators on the

river at St. Louis, East St. Louis, and Evansville, via barge to Chattanooga and Knoxville, and the Southern beyond, to Birmingham and Selma, Ala., Palatka, Fla., and Atlanta, Columbus, and Macon, Ga., the barge-rail movements, including the transfer charge, would be the low-cost mode, except for movements from Evansville, beyond Knoxville, to the destinations indicated where all-rail movements would have the low-cost advantage.

Comparisons of fully distributed costs are also made of all-rail movements by the Southern from East St. Louis, St. Louis, and Evansville with barge-rail movements from the same points to Guntersville, plus a 75-cent transfer charge, and rail beyond over other than Southern routes, to 21 specified destinations in Alabama, Florida, Georgia, North Carolina, South Carolina, and eastern Tennessee. Generally speaking, and again with "public costs" aside, these comparisons show that the combination barge-rail movements beyond Guntersville over lines other than Southern would be the low-cost routes to Alabama, Florida, and Georgia. Because of barge-rail circuity, the Southern all-rail route would be the low-cost mode to North Carolina, South Carolina, and eastern Tennessee.

The Southern attacks the use of fully distributed costs for intermodal comparisons as being basically deficient since there are constant costs not directly traceable to certain traffic, whereas such costs must be allocated when developing fully distributed costs. It also details 10 different methods whereby constant rail costs could be allocated. It is unnecessary to consider here the propriety of the utilization of fully distributed costs as a determinant of which mode has the inherent advantage of lower cost. In substance, the same matter is presently before the Supreme Court on appeal from the lower court decision in *New York, New Haven & Hartford R. Co.* v. *United States*, 199 F. Supp. 635 (D.C. Conn. 1961). Moreover, in connection with the proposed adjustment by the Southern it is apparent that on balance it cannot clearly be found that the inherent advantages, comprehending both cost and service, lie with either the Southern's all-rail routes or with the barge-rail routes, the latter including transfer charges. Cf. *Phosphate Rock—Florida to Southwestern and Western Trunkline Territories*, 316 I.C.C. 207. In any event, our ultimate conclusions herein turn on the aspect of the competition to be met; i.e., unregulated truck movements, rather than on the basis of who has the inherent advantage, with or without "public cost" considered, as between the modes parties to this proceeding.

We find that the Southern's rates at the proposed minimum weight of 450 tons are compensatory on an overall basis [11] as returning reve-

[11] Cf. *Baltimore & O. R. Co.* v. *United States*, 345 U.S. 146, 150 (1953).

nue significantly in excess of out-of-pocket costs. It is observed that were return on investment eliminated from the foregoing cost computations, as done in I. and S. No. 7179, *Coal from Southern Mines to Tampa and Sutton, Fla.*, 318 I.C.C. 371, decided October 1, 1962, the Southern's proposed rates would in all instances exceed out-of-pocket costs, and in certain instances fully distributed costs. While the instant proceeding resembles the *Coal* case in certain respects, particularly as to unregulated competition, a return here on the Southern's large investment in jumbo cars appears appropriate.

GENERAL DISCUSSION AND ULTIMATE CONCLUSIONS

On brief protestant bargelines recite as background the history through the Commission and the courts of the bargelines' attempts to obtain equality of treatment for ex-barge traffic, particularly as to ex-barge rail rates on grain from the Tennessee River ports. They assert that the involved rates followed closely upon the court decisions adverse to the railroads and the collapse of the lock (now repaired) of the Wheeler Dam cutting the Tennessee River in two below the important grain ports of Decatur, Guntersville, Chattanooga, and Knoxville. Protestant Central Soya insists that the Southern's motive is established by consideration of the latter's joint reply to the petitions for suspension, wherein it was stated that "the bulk of the grain traffic to the involved area is presently moving by unregulated water transportation, public and private, and to a lesser degree by unregulated trucks."

In addition to the fact that the indicated reply is not part of the record (see section 7(d) of the Administrative Procedure Act) and that suspension proceedings are, by our Rules of Practice, informal and based upon allegations contained in unsworn pleadings, there can be no substitute for the probative evidence adduced at the hearing. Here, upon full consideration of the many contentions of the parties, we have held, as noted above, that the actual volume of grain shipments transported by unregulated trucks in 1960 was from about 4 to substantially in excess of 6 million tons, and much more likely nearer the latter; and that such tonnage greatly exceeds the volume of grain carried by either railroads or bargelines into the Southeast. In addition, it is apparent from the record, and we so find, that all of such tonnage moves by truckers operating under the exemption of section 203(b)(6) at rates kept heretofore below rail rates and subject to further reductions without any notice. In any event, no motor carriers adduced evidence concerning their interest. While Congress has exempted such carriers from the licensing and rate regulation, we do not view such action as indicating any intent to isolate them from competition. The motor carriers have increasingly depleted

the Southern's prospective grain revenues in recent years, and an end of the trend is not in sight. Upon consideration of the magnitude and effect of such competition, we believe it reasonable to conclude that the rates are proposed to meet such competition; and we so find.

Protestant bargelines insist that the proposed rates are intended to do away once and for all with barge transportation on the Tennessee River and other inland waterways. According to the barge operators, the proposed adjustment will sweep them off the rivers and this amounts to destructive competition in violation of the national transportation policy. As indicated, we have found that the purpose of the rates is to meet unregulated truck competition which, in fact, exists even though the bargelines claim they have not felt such competition. Moreover, we do not share the apprehensions of the barge operators. As a group their earnings in 1960 from grain were but 13.42 percent of their total revenue; and much of this grain moved via the unregulated and proprietary barges. Be this as it may, even with "public costs" aside, as indicated heretofore it cannot be found that inherent cost and service advantages lie with either rail or barge-rail movements. Concerning such Tennessee River port interests as protestant Southeastern Association, as noted, 68 percent of its members are not even located on the lines of railroads and the record does not disclose the volume of grain received by the remaining 32 percent. It cannot therefore be found that they would be unduly prejudiced or unjustly discriminated against since the transportation conditions involved in their receipt of grain, including the fact that the Southern does not serve Guntersville, are not comparable to those obtaining under the proposed rates. In view of the foregoing, we find that the Southern's initiative and resourcefulness in coping with substantial unregulated truck competition does not constitute a destructive competitive practice, such as is prohibited by the act, merely because a third mode, claiming it does not suffer from such competition, may be affected by the loss of some traffic.

Having found the rates compensatory and not destructively competitive, we turn to the other allegations of unlawfulness. The bargelines on brief allege unjust discrimination, apparently under section 3(4) since they are connecting carriers of the railroads although the Southern does not serve Guntersville, but fail to connect the allegation to that section of the act. These protestants do, however, refer to those court and Commission decisions dealing with the attempts of the railroads and themselves to participate in the transportation of grain and other bulk commodities, and in which section 3(4), among other issues, was involved. Those decisions, however, were, in essence, competitive situations between the railroads and water carriers in which truck operations were of little signifi-

cance. As demonstrated, that situation does not here obtain. Nevertheless, as to section 3(4), the proposed rates from the river crossings apply equally on ex-barge, ex-rail, and ex-truck grain. The rates to this extent clearly envision the nondiscriminatory treatment toward which section 3(4) is directed. *Cf. Grain—K.C., Omaha & Related Origins to Lawrenceburg*, 315 I.C.C. 83. Other protestants, particularly Cargill, are more precise in their section 3(4) allegations. They assert that there must be reductions properly related to ex-barge traffic from the Tennessee River ports. As indicated earlier, the existing rates to and from these ports were not put under investigation by the order of suspension. However considering them as in issue, *arguendo*, examination clearly discloses that substantially comparable conditions do not prevail on the proposed all-rail traffic as on barge-rail traffic. The barge-rail shipments of grain and grain products move under single-car rates with transit. The proposed grain movements in multiple (jumbo) cars are subject to the many restrictive provisions indicated heretofore. It is apparent that the evidence of record does not establish any substantial similarity of circumstances and conditions in the service performed which justifies equality of treatment.

The multiple-car rates, minimum 450 tons, are compensatory and competitively necessary to meet the growing truck movement of a large volume of traffic. As to their relation to the single-car rates, the reasonableness thereof is essentially a pragmatic determination. The existing higher single-car rates on grain and grain products, subject to transit, have not had the effect of increasing the Southern's relative participation in the traffic despite the growth of grain movements to the Southeast. In addition, the added costs, grain waste, and infestation occurring in the use of single boxcar and regular hopper movements are greatly lessened by multiple (jumbo) car shipments. Also eliminated in connection with the latter, in addition to transit, are the other privileges discussed heretofore. Moreover, we find no discrimination on this record against small shippers or receivers. Most of the large receivers on the Tennessee River presently receive barge grain in quantities far surpassing the minimum weight of the five-car shipments. Thus, much grain traffic already moves in large lots and will continue to so move. It is not clear how small dealers would be more adversely affected by a large rail shipment than by a larger barge movement,[12] or by large truck movements.[13] Further, the proposed 450-ton rates are supported by many small shippers in the Southeast; and on intrastate movements in Georgia under similar rates shippers and millers have been shown to have actually handled

[12] Cf. *Grain—K.C., Omaha & Related Origins to Lawrenceburg, supra*

[13] Cf. *Soybean Oil, 40 Tank Car Lots from Iowa to Hammond, Ind.*, 309 I.C.C. 663, 670–671

such traffic in 1 day, without incurring demurrage, notwithstanding their limited storage facilities. Considering the foregoing circumstances, we find that the relationship between the single-car rates and multiple-car rates for 450 tons is reasonable, nondiscriminatory, and commercially feasible despite the differences in the respective rate levels and percentages.

As indicated heretofore, the trend is sharply against the use of rail transit, a costly privilege, in the Southeast; the trucks do not provide it on the vast amount of grain they handle; and barge transit is rarely, if ever, utilized. Moreover, of those mills on the Southern with transit accounts, 78.4 percent of their tonnage is not transited. Protestants contend that it is necessary to equalize the competitive opportunities of milling interests located outside of the Southeast. However, rail rates on coarse grains and feed from the river crossings to the South and Southeast are on a flat basis and millers located at or beyond such crossings do not now have equalization to the South. In addition, as pointed out by the Southern, equalization assumes that everybody uses the railroads. But we have found that motor carriage is the predominant mode. We can find no unlawfulness as a result of the lack of transit. Its absence under the proposal treats all equally.

As to the minimum weight provision, "minimum weight full visible capacity of car but not less than 180,000 pounds per car," to which objection is taken, its basis lies in the different weight densities of the various grains. Such densities range from 48.2 pounds per cubic foot for wheat and soybeans to 25.7 pounds per cubic foot for oats. Protestants contend that the latter cannot be loaded so as to meet the minimum weight and to that extent it bears a relatively higher charge. However, oats, as a bulkier, lighter loading grain, may properly be required to bear such a charge. Oats are still accorded reductions under the proposal, and the minimum proposed represents, in essence, an average of the loading capacities. We find nothing unlawful in this provision.

However, item 200 of the tariff provides that if a carrier for its convenience furnishes a car, the stenciled capacity of which is less than the minimum carload weight prescribed by the tariff for the commodity to be loaded therein, freight charges will be assessed on the basis of the stenciled capacity of the car furnished but not at less than the actual weight of the shipment. In such cases, billing must indicate that a car of greater capacity was not available. The practical effect of this item permits the carrier to substitute boxcars at its convenience. Since the compensatory nature of the Southern's proposal depends principally on the use of the jumbo cars and since no such showing was made by it as to the use of boxcars, we find that the application of item 200 is not shown to be just and reasonable, and its cancellation

will be ordered as a matter separable from the proposed rates. The Southern has already canceled this item for intrastate application in Georgia and has agreed to do so here to meet the objection of the Chicago and North Western Railway Company.

With regard to the demurrage rules, the unabsorbed switching provisions, the nonapplication of the rates to grain products, and the other restrictions under the proposed rates, including lack of transit, we are of the opinion that the fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate. *Eastern Central M. Carriers Assn. v. Baltimore & O. R. Co.*, 314 I.C.C. 5, 46. The privileges obtaining under the single-car rates bear no relation to the instant proposal which is designed to meet truck competition. We find the foregoing restrictions to be primarily matters of managerial discretion and lawful.

The midwestern millers, processors, and elevator operators believe, as stated, that grain will bypass them under the proposed rates and make them noncompetitive with southeastern mills. However, it is apparent that dissimilar conditions exist in the Midwest and the Southeast. Southern territory, as indicated, is not a principal market for flour and other grain products. The daily capacities of flour mills in the South and Southeast are but a fraction of the midwestern mills. In addition, the midwestern mills are the dominant factors in the southern markets and now compete with certain southeastern mills although the latter have available barge-rail rates, plus elevating transfer charges, lower than the proposed rates. It is apparent that the presently effective barge and rail rates afford no equalization between the delivered cost of wheat and flour in the South. Thus, incentive already exists for the relocation of flour mills to the South and Southeast, but such relocation has not, in fact, occurred. It has also been demonstrated of record that the South and Southeast are not attractive markets for mill feed, the byproduct of flour milling. Mill feed production presents, if anything, an inhibition to the growth of southern and southeastern flour milling. All things considered, there is nothing to indicate that the rates at issue would unduly prejudice or otherwise unlawfully injure the midwestern interests, particularly since few of them are on the lines of the Southern.

As to Kansas City, that market has survived the movement of truck and barge grain, all or most of which bypasses it. Since the proposed rates are directed to grain moving by truck, it cannot be found that they would result in any direct injury to that market.

It is clear from the record that the main thrust of the Southern's evidence is directed to approval of the 450-ton rates in the jumbo cars. There is no doubt that this adjustment signifies a change and consti-

tutes a technological innovation in the transportation of grain. However, progress is achieved not by condemnation of innovation but by its encouragement. If it were otherwise, complete dieselization, for example, would not have occurred. We are here faced with a proposal designed to meet unregulated truck competition which has already upset the rail grain rate structure and distorted relationships among markets, commodities, and shippers. The Southern's proposal did not cause these difficulties. Rather, we find here an effort by the Southern to obtain revenue, which has bypassed it over the years, to enable it, under honest, economical, and efficient management, to provide railway service at the lowest cost consistent with the furnishing of such service. That such an effort is in accord with section 15a(2) of the act and the national transportation policy is manifest. The Southern's solution under the proposed rates involves the investment of millions of dollars in the new jumbo hopper cars and the development of more efficient operating facilities. Such technological efficiencies and managerial initiative constitute elements to be promoted under the national transportation policy rather than to be stultified.

We are convinced that Southern has made a prima facie case of lawfulness, and that protestants have failed to overcome it. Should adjustments prove necessary, the Southern has indicated that it stands ready and willing to provide rates on a similar basis as may be reasonably requested by shippers who use railroad service. We view such willingness as demonstrating a cooperative intent and do not now mean to indicate that such changes are, or will be necessary, or required without a demonstration of the lawfulness thereof.

Respondents, other than the Southern, take a position of neutrality with respect to the proposed rates. They have filed no briefs but testified at the hearing that grain traffic is of great importance to them and their shippers. However, protestants have shown that the proposed rates for movements via the other respondents in multiple hoppers and boxcars would not be compensatory. To approve, as compelled by rail competition, the 450-ton rates for the other respondents, would nullify to a large extent the Southern's great expenditures for the more efficient and economical jumbo cars and would sanction the reduction of rates not shown to be just and reasonable. In addition, the other respondents have failed to demonstrate the lawfulness of the rates with respect to the other allegations made. However, this is not to say that similar rates for others would not be lawful if jumbo cars were to be utilized, under like conditions, and were otherwise justified.

There is little probative evidence with respect to the commercial need for the proposed rates subject to minima of 900 and 1,800 tons, which comprehend large and costly shipments. Moreover, the record

does not establish that there would be sufficient loading and unloading facilities as well as track space to accommodate at one time 10 or 20 jumbo hoppers of the Southern or 18 to 36 boxcars of the other carriers, both of which would, in all likelihood, involve increased switching costs at origin, at destination, and at intermediate yards. In addition, neither respondents nor protestants provided specific cost evidence for such shipments to develop the compensatory nature of these rates, and there does not appear to be any competitive necessity or other justification therefor. Accordingly, we find that the 900-ton and 1,800-ton rates have not been shown to be just and reasonable.

ULTIMATE FINDINGS

Except to the extent that item 200 is applicable, we find that the proposed 450-ton rates of the Southern, minimum 90 tons per car, are just and reasonable, and otherwise lawful. As to item 200, we find its application not shown to be just and reasonable. We further find that the proposed 450-ton rates, minimum 50 tons per car, of respondents other than the Southern and the proposed 900-ton and 1,800-ton rates of all respondents have not been shown to be just and reasonable, and otherwise lawful. An order will be entered requiring cancellation of the schedules to the extent found not shown to be lawful, and discontinuing the proceeding.

APPENDIX A

Operating improvements of railroads

The Southern operates 8,500 miles of main track within an area confined by the Mississippi River on the west, Atlantic Ocean on the east, Potomac and Ohio Rivers on the north, and the Gulf of Mexico on the south. To avoid repetitive switching of cars from yard to yard, a major retarder yard was constructed at Knoxville, Tenn., at a cost of nearly $6 million and saves more than 8 hours of transit time by being able to use one switch instead of up to six or more. The new retarder yard paid for itself in 3 years, before taxes. New yards were then built at Birmingham, Atlanta, and Chattanooga. These four yards cost $60 million and the money was returned in less than 5 years.

Other examples of efficiency on the part of the Southern include the substitution of machinery for manual labor in the replacement of crossties. On-the-line storage of crossties was discontinued and replaced by storage in one creosoting yard. This reduced handling costs by 42 cents per tie, enabling the Southern to maintain track at about the same cost as during the 1920's. All track is built in Atlanta and all rail is welded at that plant in 1,440-foot lengths. A new train of specially constructed integrated cars hauls 56 lengths of welded track or 14.5 miles at one time, resulting in savings in excess of $1,000 per main track-mile per year.

The Southern has reduced its locomotive and car maintenance shops from 14 in 1951 to 2 at the present time. The centralization enables stocking of tool

shops with high-speed equipment, thus utilizing this equipment on all repair jobs. On June 17, 1953, the Southern was completely dieselized and has not used any steam locomotives since that time. It has installed microwave communication, 200 miles in southern Georgia and northern Florida, and intends to equip fully all its operations with microwave installations. Microwave offers foolproof communications for vast amounts of data, and will speed the movement of traffic by giving instantaneous knowledge of the location of equipment.

The use of microwave, it is estimated, will result in a 5- to 10-percent decrease in the $40 million per year gross Southern now has in its per diem account with other railroads. This would reflect a minimum savings of $2 million per year. Moreover, the Southern could operate with 2,500 fewer of the 50,000 cars it now operates, and at an average cost of $10,000 a car this would reflect savings of $25 million. It is emphasized that an overall figure of various economies effected by the Southern is $125 million.

By 1956 the Louisville & Nashville was completely dieselized and now owns 732 locomotives, representing an investment of $104,300,000. This respondent was a pioneer in the centralization of mechanical department equipment shops. Now, all heavy repair work to locomotives and freight and passenger cars is performed in the Louisville shops. The Louisville repair shops have been and are being modernized to take advantage of the latest technological advances in an effort to reduce cost of operation. Modern air operated tools are used to reduce manpower to a minimum. Modern automated machinery in the wheel shop at Louisville now enables 6 or 7 employees to perform work that formerly required 35 or 40 employees. The installation cost of this operation was $1 million.

At present a $4 million improvement program is underway in the freight car shop. Buildings are being erected over work areas that formerly required the employees to work outdoors in all kinds of weather. Therein, the most modern material handling equipment is being installed, such as cranes and conveyors, resulting in a reduction of man-hours required in making repairs to the equipment. New hump yards have been built at Atlanta, Pensacola, Nashville, Chattanooga, Birmingham, and Mobile and at De Coursey and Atkinson, Ky., at respective costs of $7,691,984, $501,000, $10,253,863, $4,843,000, $9,703,891, $270,000, $11 million, and $1,800,000. Total expenditures for modernization of all large freight terminals amount to $45 million. Centralized traffic control has been installed on a little more than 2,000 miles of their total miles of track. Recent telephone and teletype communication improvements have been made at a cost of $1,820,000, and $600,000 has been spent for the installation of radio in locomotives and cabooses.

As of December 31, 1961, the average age of all Louisville & Nashville cars was 11.79 years. During the past 5 years it has acquired 14,602 new freight cars at a cost totaling $146,066,213, many of which are equipped with damage-free lading devices, hydracushioned underframes, nailable steel floors, and removable covers for open top type cars. Roller bearings are an important feature, and 6,698 of the freight cars are now roller bearing equipped. The additional cost for these roller bearings amounts to $5,525,000.

Use is being made of electronic data processing machinery in all of the principal terminal train yard operations of the Louisville & Nashville. Since 1952, 1,751 industries have located on its lines with a total capital investment amounting to approximately $1,225,150,000. Its main lines serve the area from Cincinnati to Louisville, Memphis, Birmingham and New Orleans, and from St. Louis to Nashville and Atlanta. If the proposed rates are approved, it expects to purchase jumbo covered hopper cars for the movement of grain

APPENDIX B

The grain consuming animal unit (G.C.A.U.).—For the feeding years beginning October 1, 1941, and October 1, 1949, the late R. D. Jennings of the United States Department of Agriculture, in collaboration with other technicians in the Department, published estimates of feed consumed by livestock within the various regions and States. These estimates were made possible because large amounts of data on feeding rates and feed consumption were collected by the Department and by various wartime agencies which collected such data during the period 1940–45. Through the use of this data and data from other sources, the late Mr. Jennings was able to determine relatively accurate feeding rates for individual States.

A witness for the United States Department of Agriculture submitted several exhibits, and a portion of the data contained therein was used in the study as submitted by the Southern to show the participation of the various modes, as noted, in the movement of grain into the involved area. For example, the amounts of feed of various kinds consumed by livestock annually in terms of tons of feed fed and also in feed units by which the various kinds of feed are equated to the feeding value of corn are shown. Also, amounts of feed fed per head and per unit of production were developed at the national level. Animal units of livestock fed annually were developed by States. Therein, livestock numbers within each State were weighted by their feed consumption in that State as compared with the feed consumption of the milk cow. Thus, the varying feeding rates from one State to another were reflected.

To determine the number of animal units within a State, the number of each kind of livestock is multiplied by a factor which is the amount of concentrates consumed by that type of livestock divided by the amount of concentrates consumed by the average milk cow in the United States. There are different factors for the different animals, such as milk and beef cows, stock sheep, horses and mules, hogs, chickens, and turkeys. These factors were developed on the basis of feed balances that were made by States. These factors were computed from the relationships of feed as fed to dairy cows as against hogs and other livestock. Thus, chickens, hogs, and other animals are related to dairy cows in the relationship to total concentrates fed. On this basis, it is stressed that it would make no difference if the hogs' share is mixed with a like amount of water or milk. The feed consumption data consist of total aggregate amounts of feed fed, as reported by the Department of Agriculture.

The data on animal units were used by the respondent Southern's witnesses to establish the amount of feed grains fed to poultry and livestock in the involved area. The next step was to multiply the number of animal units within each of the States by a feeding rate per animal unit. In 1959 the feeding rate used by the Department of Agriculture was determined by taking the total amount of concentrates (145.2 million tons), fed to livestock at the national level and dividing by the total number (165.7 million) of grain-consuming animal units also at the national level. This results in 0.88 of a ton of the concentrates fed per animal unit. This feeding rate is based on the national level. Concentrates, as used in this record, include corn, oats, barley, and sorghum grains, wheat and rye, oil seed cake and meal, and animal protein feeds and other byproduct feeds. The total concentrates fed, 145.2, is a residual figure. It represents the actual consumption less stocks at the beginning of the year, in this instance 1959, minus exports, miscellaneous grains eaten by human beings, and minus stocks at the end of the year.

However, the Southern study was concerned only with the consumption of corn, oats, barley, and sorghum grains, and at the national level this computed to 115.8 million tons in 1959, a residual figure. It uses this factor of 115.8 divided by 165.7 which reflects approximately 0.7 of a ton. Thus, 0.7 of a ton times 3,683,000, the concentrates consuming animal units fed in 1959 in Alabama, totals 2,578,100 *tons of poultry and livestock feed.*

As noted previously, the total of the animal units within a given State for 1959 is derived by taking the numbers of all kinds of livestock that are reported by the Department of Agriculture, and multiplying those numbers by certain factors. These factors, for all types of livestock and poultry, except broilers, were based on the period 1940–45. For broilers the base period used was 1953–55. It was indicated by the Department of Agriculture that these data were never used by them to determine the amount of movements in a quantitative sense by motor vehicle into the Southeast.

Besides Alabama, in 1959, concentrates consuming animal units in Virginia, North Carolina, Kentucky, Tennessee, South Carolina, Georgia, Florida, and Mississippi are shown as 2,507,000, 4,500,000, 3,158,000, 3,154,000, 1,835,000, 5,615,000, 1,333,000, and 2,810,000, respectively. These units times the feeding rate per animal unit, 0.7 of a ton, resulted in data showing the tons of poultry and livestock feed used. In the study a final adjustment was made for the estimated quantity of feed grains contained in the net shipments of formula feeds in or out of this area.

The grain consuming animal unit (G.C.A.U.) represents the feed ration of each of a dozen or more classes of grain-consuming livestock (milk cow, beef cow, hog, horse, and broiler) that produce the various products such as milk, butter, meat, and eggs. It constitutes a common denominator for measuring the animal numbers. In essence, the G.C.A.U. is a mythical animal representing a composite of over a dozen different types of livestock. Likewise, the feeding rate per G.C.A.U. is a composite of the feeding rates for these several classes—which range from a few pounds for broilers to over a ton for milk cows—and represents a weighted average of the feed grain proportions or ratios in the various individual feeding rates. As a witness for the Department of Agriculture stated:

"An animal unit is the equivalent of one milk cow in terms of feed consumed. Each kind of livestock and poultry is converted into an animal unit or fraction thereof by dividing the quantity of feed consumed per head by the quantity of feed consumed by one milk cow. * * * The base period 1940–45 is used in computing these ratios (or factors) for all livestock except broilers, in which the period of 1953–55 is used."

The quantity of feed consumed by one milk cow, which is used as the base for computing the G.C.A.U. factors, is the 6-year average of the national feeding rate for milk cows during the period 1940–45. As previously noted, the animal unit factors had been developed for each of the individual States as well as for the United States as a whole. The State factors, based on the feeding rates within each specific State, vary from State to State, reflecting the changes in feeding rates from one State to another. As pointed out in the brief of the Department of Agriculture, it is the existence of these State factors that makes possible a computation of the feed utilization in an individual State or in a group of States, such as the Southeast. These animal units are an index, and they measure movements and changes in livestock from year to year. Like any other index with a given base period, certain relationships develop. The argument is made by the protestants that a later base period than 1940–45 should be used. However, the respondent stresses that the number of

animal units on a State basis and also on a national basis will increase the feeding rate per animal unit, because the feed disappears regardless of how the animal population is described. It points out that if the base period is changed there would be a smaller number of animal units with a resulting greater feeding rate per animal unit. It is explained that the main advantage of a change in the base period to a more recent period would be to "remove the unwarranted distrust of those people who imply much more significance to the base period than is justified."

The protestants also attack the G.C.A.U. method as inaccurate in estimating the volume of grain fed to "other livestock," and the volume of grain lost through waste, insects, and related factors. "Other livestock" includes miscellaneous livestock on farms such as ducks, geese, guinea hens, game birds, dogs, cats, fur bearing animals, and all livestock not on farms.

In its brief, the Department of Agriculture again explains that the estimate of the volume of grain fed to poultry and livestock in the Southeast by the G.C.A.U. method is arrived at by multiplying the number of G.C.A.U.'s in the Southeast by the feeding rate per G.C.A.U. This feeding rate necessarily includes an allowance for "other livestock," for which no number of G.C.A.U.'s exists, and consequently, the Southeast is allocated a proportion of the national estimate of feed for "other livestock."

The G.C.A.U. method is based on the assumption that the waste and loss rate is the same in all areas, although a witness for the Southern cited a number of publications which show that the loss of grain is substantially higher in the Southeast than for the United States as a whole. This higher loss rate is not reflected in the G.C.A.U. calculation, and, to the extent it is not, this final estimate is understated.

The F.G.C.A.U. computation.—As noted, the protestants submitted various recalculations of estimates of feed grains fed to poultry and livestock on various bases and at various feeding rates. In the first recalculation of such data, waste was eliminated from the feeding rate per animal unit and in 1955–56, 1956–57, 1957–58, 1958–59, and 1959–60 the derived motor shipments are shown as 2,034,000, 1,347,000, 3,352,000, 3,389,000, and 3,851,000 tons, respectively. In the second recalculation, waste and other livestock are subtracted from the poultry and livestock feed and result in derived motor shipments of 1,491,000, 669,000, 2,528,000, 2,566,000 and 2,975,000 tons for the same periods. The third computation deletes waste and other livestock, with a "milk cow adjustment," the latter reflecting current relationship of States to the United States in feeding rates per head, and results in derived motor shipments of 1,080,000, 364,000, 2,223,000, 2,263,000, and 2,673,000 tons for the respective periods.

The fourth recalculation substituted what is called the feed grains consuming animal unit basis (F.G.C.A.U.) as devised by the protestants, without the elimination of waste or other livestock. This basis differs from the bases of the respondent in that the national factors used to convert the number of head in each listed class of poultry in each State to the so-called F.G.C.A.U.'s is based on feeding rate relationships for feed grains rather than on feeding rate relationships for total concentrates. Thus, one F.G.C.A.U. is the equivalent of one milk cow in terms of feed grains consumed. The United States Department of Agriculture does not publish State animal unit factors based on feeding rates of feed grains considered separately from the total concentrates of which they are a varying part, dependent on the class of livestock considered. Consequently, this basis uses the same "adjustment to State" factors for F.G.C.A.U.'s as those reflected by the basis of the respondent. Under the fourth recalcula-

tion the derived motor shipments are shown respectively as 753,000, 305,000, 2,893,000, 2,744,000, and 3,680,000 tons.

The fifth recalculation uses the F.G.C.A.U. basis and eliminates waste from the feeding rate per animal unit. Under this computation the derived motor shipments into the Southeast are shown as 753,000, (28,000), 1,801,000, 1,656,000, and 2,052,000 tons. Waste and other livestock, plus the F.G.C.A.U. basis, were used in the sixth recalculation resulting in derived motor movements of 186,000, (625,000), 1,078,000, 912,000, and 1,266,000 tons. Adding the milk cow adjustment to the above factors, the seventh recalculation shows (247,000), (1,037,000), 664,000, 501,000, and 855,000 tons. The figures in parentheses are intended to indicate that according to the statistical approach used, on balance more grain moved out of the South than was shipped into that area.

The N.C.M. studies.—The total utilization figures arrived at by the protestants rather closely approximate those found by the North Central Grain Marketing Research Committee which was a study known as the NCM-19 Region Research Project, which study the protestants say was ignored by the respondent's witnesses. The same assertion was made with respect to the Department of Agriculture's Marketing Research Report 490 which summarized the volume of non-Government grain shipments from country elevators in the north central region to the Southeast for the calendar year 1958.

On the other hand, the respondent's witnesses testified that they employed these studies for background information. Both studies were limited to truck shipments out of country elevators in the north central region. Neither attempted to include figures for motor shipments out of terminal or subterminal elevators, nor shipments direct from farms via itinerant or merchant truckers. Moreover, country elevators with an annual grain handling volume of less than 10,000 bushels were not considered. Also, the respondent estimates that in 1958, for example, the volume of grain bypassing country elevators and moving direct from farms contiguous to the Southeast to southeastern destinations total 21,759,000 bushels. Thus, neither study provides a complete picture of the actual total motor movement.

The data gathered in the NCM-19 studies cover only 3 years, which the respondent considers a brief period in which to determine the trend at issue. It is pointed out that a study known as the NCM-10 was conducted in 1945-55 but covered one less State (Wisconsin) than the NCM-19 studies. The data gathered under the latter studies covered only the crop years 1956-57, 1957-58, and 1958-59, while there was no study for the year 1955-56.

APPENDIX C

Analysis of soybean data.—Soybean data were not available on a comparable basis with other grain for the 1955 to 1959 period. Thus, a separate analysis of the soybean movement was made. The principal use for raw soybeans in the Southeast is for crushings; and information on crushings for the individual States is available for only four of the nine States. This information only goes back as far as 1957 for two of the four States. It was determined that seven of the nine States produce more soybeans than they consume. Because of the surplus of production of soybeans, shipments of this commodity into this area are primarily to a limited number of States for crushings or for export.

Shipments of soybeans in the Southeast have increased more than one million tons per year during the 1955-59 period. This has been caused by a major increase in the use of soybeans and in crushings and exports. Rail and water carriers have realized increased soybean shipments into the Southeast. How-

ever, much of the rail increase has been for export purposes. A limited number of States, particularly Tennessee, Kentucky, and Mississippi, accounted for most soybean consumption and production in 1959. Tennessee, Kentucky, and Alabama accounted for most receipts of inbound shipments. Thus, changes in soybean consumption, production, and transportation have been concentrated in only a few southeastern States.

The result of the analysis indicates that production of soybeans has increased some 800,000 tons in the 5-year period. However, during this period soybean crushings have increased 1,400,000 tons, and water shipments (primarily exports) have increased 500,000 tons. Thus, additional shipments into this area have been required to meet a soybean deficit which has grown to nearly 1,100,000 tons during 1955 to 1959.

Study of interregional receipts of raw grain.—Another study was undertaken by the Southern also producing derived motor movements of grain into the Southeast to estimate interregional receipts of raw grain plus soybeans for domestic uses only. These calculations serve to further verify the results of the grain (concentrate) consuming animal unit method previously described in some detail. In 1959, it was determined that the total receipts of grain and soybeans for all uses, including export, aggregated 6,569,000, 2,308,000, and 3,025,000 tons for motor, water, and rail, respectively, or a total of 11,902,000 tons.

In the territory involved there are two major ports where grain is exported, Hampton Roads-Norfolk, Va., and Mobile, Ala. The total volume of grain exported at these points by commodities was prorated on a percentage basis to the number of carloads reported by the Association of American Railroads. For example, if the total exports from either of these ports was a million bushels, and 25 percent of it was corn, then the 25-percent figure would be applied against the number of carloads as shown. Then the average weights per carload for all class I railroads in 1959 were used for the commodities making up the grain-soybean category. It was on this basis that the estimated volume moving by rail to these ports of export, Hampton Roads and Mobile, was shown as 1,039,049 and 913,457 tons, or a total of 1,952,506 tons.

In "Grain Market News," published by the U.S. Department of Agriculture, the estimated export volume to Norfolk and Mobile by all modes of transportation was determined as 1,491,776 and 1,143,884 tons, respectively, or a total of 2,635,660 tons. Since the railroads moved 1,952,506 tons, it was assumed that 683,154 tons moved by motor and water. Subtracting 2,635,660 tons from the total of 11,902,000 tons reflects 9,266,340 tons which is the estimated interregional grain receipts necessary to satisfy domestic uses in the nine considered States.

As noted 1,952,506 tons moved by rail to the named ports of export. This figure subtracted from the rail movement, shown as 3,025,000 tons in the total receipts for all use including export, results in 1,072,494 tons, and the latter figure subtracted from the total of 9,266,340 tons, estimated grain receipts to satisfy domestic uses, leaves 8,193,846 tons for the motor and water movements. Subsequently, data for water movements were published but they were not available at this time.

In their criticism, the protestants, for comparative purposes, increased the respondent's water data of 2,308,000 by 42,000 tons, resulting in a total restated figure of 2,350,000. This addition was stated as reflecting the intraregional receipts at Mobile and Norfolk. Then 433,900 tons were added to reflect the rail intraregional movements, making a total receipt for all uses for rails of 3,458,900 tons. The protestants consider the rail figure of 1,072,494 tons as understated and they added the 433,900 tons, as noted above, to reflect the intra-

regional movements by rail to Alabama and Virginia. Because of later figures which were not available at the time the respondent's witnesses testified, they were able to separate the water and rail data, showing 6,131,546 tons for motor, and 2,104,300 tons for water. As noted, the difference between the respondent's and the protestants' ultimate figures is accounted for by 42,000 and 433,900 tons, stated as reflecting intraregional movements. However, the respondent takes the position that traffic is no different with respect to the supply in the Southeast area whether the export came from intraregional or interregional shipments.

For motor, water, and rail the protestants also compute the respective tonnages (in estimating domestic interregional receipts) of 4,413,546, 2,104,300, and 1,506,394 tons, a total of 8,024,240 tons. The principal difference involved in this computation is attributed to an inbound net motor figure of 4,851,000 tons because of the protestants' use of the matching of the crop years rather than the calendar years.

While another computation by the protestants reflects the multiple residual method, as in the above paragraph, they used different factors and multiples insofar as the number of livestock and poultry was concerned and the amount of feed fed per head. On this basis for the motor, water, and rail the estimated tonnages amount to 1,538,546, 2,104,300, and 1,506,394 tons, a total of 5,149,240 tons.

The protestants also show motor shipments into the Southeast of 1,889,000 tons as compared to 6,569,000 tons as used by the respondent in the first instance. This method, considered by the protestants as the most accurate, is called by them the "direct ascertainment method." It is on this basis that they compute for motor, water, and rail 1,899,000, 2,104,300, and 1,506,394 tons, respectively, a total of 5,499,694 tons, to satisfy domestic use of grain in the involved area.

In rebuttal, it was brought out that the protestants had assumed that all of the intraregional rail shipments of 433,900 tons to Virginia and Alabama went to the ports to be exported. The respondent indicates that the intraregional rail movements would more likely be going to inland points in these States.

APPENDIX D

Survey of anticipated grain movements under multiple-car rates.—A statistical survey was conducted by the Southern which purports to reflect interregional grain movements to be anticipated under the suspended multiple-car rates. Its stated purpose was to assemble information with respect to prospective grain buyers who would use the proposed rates. A statistical sample of approximately 19 percent of all of the grain users in the Southeast was taken in October 1961, comprising every county in each of the nine States that was located more than 70 miles from a river crossing point of origin; specifically Cincinnati, Evansville, and Memphis. The statistical process reflected information of anticipated rail grain movements in single and multiple carloads, by destination, as reported by the grain receivers. It was determined that most of the grain traffic originating at Memphis and Louisville had its ultimate source outside the South.

The actual sample of rail terminations for 1960 in the nine-State area was 59,494 tons of grain. The anticipated rail terminations, based on the sample, and assuming multiple carload grain rates were available in 1960, total 438,642 tons or 7.372 times as much. A total of 319,387 tons of grain and soybeans originating outside the Southeast was terminated by the Southern within the defined Southeastern area. Multiplying this by 7.372 gives a gross anticipated interregional volume of 2,354,521 tons. Of the sample anticipated volume of

438,642 tons, 42.33 percent or 185,666 tons would have originated in the area embracing Indiana, Michigan, Ohio, and Louisville. Multiplying the gross anticipated grain volume of 2,354,521 tons by this factor of 42.33 percent results in 996,669 tons originating in the above area and moving into the nine States. The nonexpanded sample anticipated volume moving from this area to the northern part of Alabama totals 1,372 tons, or 0.74 percent of 185,666 tons—the latter total sample anticipated rail grain traffic from that origin area into the defined nine-State area. The 0.74 factor applied, times the 996,669 tons—the derived total volume that the Southern would move from Indiana, Michigan, Ohio, and Louisville into the nine States—results in an expanded anticipated Southern Railway System volume of 7,375 tons into northern Alabama.

Each of the nine States was divided in half so that the destination areas could be presented in a realistic and representative fashion for the computation of revenues and costs. For example, Birmingham and Tuscaloosa, Ala., were included in the northern part of Alabama. The figure of 7,375 tons was divided between single- and multiple-carload shipments on the basis of the anticipated use of these services by grain dealers interviewed. That division was 22.29 percent in single cars and 77.71 percent in multiple cars. The resulting volumes are 1,644 tons in single cars and 5,731 tons in multiple cars. Thus, to Birmingham with 84.9 percent of terminations, the forecast in five-car multiple shipments is 4,866 tons and to Tuscaloosa with 15.1 percent of terminations, 865 tons. On this basis forecasted tonnage in five-car multiple shipments to Gainesville, Macon, and Flowery Branch, Ga., Asheville, Charlotte, and Statesville, N.C., Leesville, S.C., and Chattanooga are stated as 40,599, 70,881, 113,806, 34,319, 70,674, 154,146, 25,286, and 20,330 tons. The probable gateways for these movements are shown as Evansville, Louisville, and Cincinnati.

As stated, the survey of the 9-State area included 2,081 grain receivers in 140 counties of the 834 involved. The list of grain receivers, with deletions and additions, resulted in a "corrected" total number of 1,478. Questionnaires were then sent to 490 grain receivers. Of this number 178 were found to be nongrain users and 37 were added to the list, reflecting a total in the statistical sample as used of 349. Sixty-three of those either refused to answer or could not be contacted; thus the final total of the sample made in the survey was 286 grain receivers.

In their analysis of this statistical survey the protestants, reviewing 8 respondent's exhibits, point out that of the 286 grain receivers, only 89 expected to use the multiple-car rates. Only 64 were in a position to use the rates, 51 gave an estimate of tons to be shipped, and 11 expected to be able to use only single-car rates. In Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia, the protestants testified that only 12, 5, 21, 3, 6, 20, 3, 6, and 13 grain receivers, respectively, supplied useful information. They point out that "while the survey was intended to cover in excess of 25 percent of the grain users" actually only 19 percent answered a questionnaire used in the study. As noted, this fact was explained by the respondent.

The protestants take the position that the tonnage data, as reflected by the survey, cannot be relied upon because the data are initially inconsistent in large part, because they were improperly processed, and because the whole procedure, they say, produced unreasonable results. While the protestants' witness was highly critical of the Southern's statistical study, he was quite clear in testifying that he had only a very limited experience in the field of statistics and did not hold himself out as an expert in the field of sampling.

Recognizing that the statistical approach is not completely precise, nevertheless it presents a fair forecast of the possible movement of grain in multiple-car shipments. The anticipated shipments of 438,642 tons, as noted above, are even lower than the estimates of motor inbound shipments as computed by the protestants. Yet the recapture of that volume, or even a substantial part thereof, from unregulated itinerant truckers would be of significant economic benefit to the railroads.

APPENDIX E

Eight-State survey of truck grain movement

Between November 29 and December 1, 1961, the Georgia Public Service Commission, in cooperation with seven other States, Alabama, Florida, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia, conducted a 2-day survey to determine the movement of grain by motor vehicle into the South. Road checks were made at 45 points in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia and began at noon on November 29 and ran through noon on December 1. There was nothing significant about the dates chosen as to volume of movement anticipated, it being merely the 2-day period most acceptable to all the States involved during the limited time available for making the check.

Checks in all of the States except North Carolina and South Carolina covered the stated 2-day period. North Carolina conducted the check for the entire 5 working days of that week at its weighing stations established for that week. In South Carolina there were only two vehicles hauling grain found during the first 30 hours of its check and, since the results did not appear to justify its staff spending another night checking in 15° weather, the South Carolina commission called off its check after that time.

The round-the-clock road checks conducted at these 45 points in the South, as noted above, were made by crews of 2 to 6 men. An effort was made to provide coverage of the principal north-south and west-east highways. Trucks were stopped at these points and information was secured as to the commodity, weight of load, name and address of the operating carrier, the type of operation, type of vehicle, and the origin and destination of the shipment. Truckloads of whole grains were found to have originated at approximately 125 points in Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia. Some 93 destination points were found in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and the District of Columbia.

It was emphasized that this survey was not conducted to ascertain the full volume of movement of grain via motor carriers, but rather to develop the characteristics of such movements. The results of the survey clearly indicate that the movement of whole grains by truck in and to the South is large in volume; the scope of such movement is widespread as to origin and destination; the whole grain movement via truck is handled in standard vehicles, without modification and with practicable loading; and is participated in by many and varied types of truck operators, on both private and for-hire bases and both head-and-return-hauls; that is, both the outbound and the backhaul.

The total weight of 180 truckloads of corn amounted to 6,183,961 pounds and the total weight of 52 of the truckloads of whole grain other than corn amounted to 1,693,410 pounds. The aggregate of 7,887,371 pounds, or almost 4,000 tons, shows that the total movement of grain by truck in the South is substantial in

volume. The average weight in the various type trailers was 35,568 pounds, and the average weight in the straight trucks was 21,168 pounds. For example, 69 van, 12 refrigerated, 1 hopper, and 128 grain trailers, and 26 straight trucks were noted. The 12 shipments in refrigerated trailers were obviously backhaul from the movement of fruits and vegetables northbound. The so-called grain trailers were actually flat-bed trailers with sides but no top other than tarpaulin. Four truckloads of corn were eliminated from the survey because of failure to complete properly the form on those vehicles.

The operators of these grain-hauling vehicles included grain sellers, processors, individuals, certificated carriers, lumber companies, produce companies, a box company, and a canning company.

There were no objections to the exhibits presented by the witness pertaining to this survey, and cross-examination was waived by the protestants. However, in cross-examining a rebuttal witness of the respondent, one of protestants' counsel developed that contrary to exhibits of record no corn had moved from A. E. Staley of Decatur, Ill., to points in Alabama, Georgia, or Florida. He states that actually movements from the Decatur shipper "consisted of gluten meal or gluten feed, a byproduct of the Staley operations and not whole grain." Also, the protestants' counsel points out that no corn moved from a Central Soya terminal operation at Bellevue, Ohio, to a southern destination. An exhibit of counsel for the protestants reflects no movements of corn from Bellevue and Decatur during the years 1958 and 1959. Other origins are shown on this exhibit and consist of shipments of inspected truckiots only.

Assuming that no corn moved from these two shippers, one at Decatur and the other at Bellevue, this would not minimize the probative value of the survey. Corn could move from other shippers at Decatur and by itinerant trucks out of Bellevue to southern destinations.

APPENDIX F

Two major points of dissension were developed between the parties concerning the cost study prepared by the Southern. These issues, which will be discussed and resolved as a preliminary to considering other aspects of that study, are out-of-pocket percent variable, and car utilization.

Out-of-pocket percent variable.—The so-called out-of-pocket percent variable means the percent of a rail carrier's total operating expenses, rents, and taxes which at a given level of traffic vary with the volume of traffic handled. A variable of 80 percent is normally used in our Rail Form A applications, and this percentage is used by protestant bargelines in their rebuttal to the Southern's cost study. The matter becomes an issue because in the latter study the Southern uses a 70-percent variable.

The 70-percent variable covering the Southern Railway System was developed by adjusting total operating expenses, rents, and taxes (freight and passenger) for the years 1947 through 1960 to a common dollar basis using a deflation index based on the period 1947–49. The sum of $50 million, which is 20 percent of the average of deflated expenses in the 1947–49 base period, was subtracted from the descending series of expenses in the years 1947 to 1960, inclusive. This results in a descending series of percents variable ranging from 80 percent for the base period to 68.8 percent for 1960. The use of the 20-percent constant factor is apparently based on ICC Statement 4–54 wherein percents variable for freight expenses in southern region (excluding Pocahontas) are shown under various methods as 80 percent, 79 percent, and 83 percent, with the fixed cost complement being approximately 20 percent.

The percent variable analysis by the Southern assumes that all improvements in railroad technology since 1947 have been in the area of variable costs and, conversely, that none served to change the aggregate quantum of fixed costs. This assumption is criticized by protestant bargelines who also present several analyses in support of their contentions that the 20-percent constant factor as used by the Southern is improper, and that 80 percent is a reliable percent variable for the Southern Railway System.

Protestants point to the trends in expenses per thousand trailing gross-ton miles for southern region and the Southern Railway System to show that the trend in the cost per thousand trailing gross ton-miles for southern region and the Southern Railway System in the period covered by the Southern's percent variable study is substantially similar. For the base period 1947–49 the cost per thousand trailing gross ton-miles for southern region was $4.21 and for the Southern system it was $4.23. In 1960 the comparable figures were $4.93 for southern region and $4.91 for the Southern Railway System.

In another analysis the bargelines show for the Southern Railway System, southern region, and the United States, the traffic density and percentage relation of principal general accounts to total railway operating expenses, freight and passenger. Their purpose is to bring up to date (1960) table 12 in I.C.C. statement No. 4–54 and to set up comparable figures for the Southern Railway System and southern region to determine whether there is any marked difference in the trends developed in table 12, when a three-way comparison is made for the extended period. The figures indicate that conclusions in statement 4–54 for the United States for the period through 1952 apply through 1960, and also apply for the Southern Railway System and southern region. Comparisons between 1940 and 1960 for the Southern Railway System show that in 1940 maintenance of way and structures was 18 percent of total expenses, and in 1960 it was 18.56 percent; maintenance of equipment was 25.77 percent and 25 percent; traffic was 2.77 percent and 3.42 percent; transportation was 47.94 percent and 44.78 percent; and general and miscellaneous expenses amounted to 5.52 percent and 8.24 percent. This analysis shows a continuing equable relation of the percentage distribution of expenses, and it indicates that the trend of variability is about the same in the current period as it was in the earlier period. If a heavy element of fixed costs in one of these major categories had occurred, the percentage relation of these groups of expenses to the total would have shown a marked trend in variation.

Another showing by protestant bargelines is based on chart 3 in I.C.C. statement 4–54. This chart shows the "freight service operating expenses, rents and taxes per mile of road related to gross ton-miles of cars, contents and cabooses in freight trains per mile of road, Southern region—1946." Based on the analysis shown in this chart for southern region (excluding Pocahontas) for roads with average hauls 100 miles and over the percent variable was determined to be 80 percent. The Carolina and Northwestern was not included, because it was not a class I railroad when the chart was prepared. However, the other five lines of the Southern Railway System were included. Four of these lines, the Southern Railway, New Orleans & Northeastern, Alabama Great Southern, and Cincinnati, New Orleans & Texas Pacific Railway each had a traffic density higher than the territorial average. The only system road below the territorial average density was the Georgia Southern & Florida. Protestants conclude that if 80 percent is the result at average density of southern region, for a greater density this chart will reveal a higher percent variable. Based on the years 1958 to 1960, the type of analysis shown in chart 3 is advanced.

Using the accepted formula for determining the line of best fit, known as the least squares method, protestant bargelines show the fixed portion to be $6,176 and the variable factor to be $3.73062 per thousand gross ton-miles per mile of road. By applying these two factors for the southern region to the gross ton-miles per mile of road of the southern region and the Southern Railway System, the percents variable become 76 percent and 78 percent, respectively. The same procedure applied to the six individual roads of the Southern Railway System, shows the fixed portion to be $5,265 and the variable factor to be $3.96010 per thousand gross ton-miles per mile of road. By applying these two factors to the gross ton-miles per mile of road for the Southern Railway System the percent variable is shown to be 81 percent. Based on the above computations, the present range of variability is indicated to be between 78 and 81 percent. Consequently the bargelines use 80 percent variable in their rail cost calculations.

The Southern criticized the analysis by protestants, stating that in determining the percent variable for 1960, as compared to the 1946 or 1951 analysis, the Nashville, Chattanooga & St. Louis Railway was not included in the 1960 analysis. The latter carrier merged with the Louisville & Nashville and its traffic data is included in the reports of that carrier. The Southern also maintains that, in computing a percent variable, the Southern Railway System should be considered as a consolidated system rather than as six individual lines.

In 1946 the Southern system was composed of five class I railroads and had only top management in common. In several instances these roads had their own accounting and purchasing departments, and while controlwise they were a system, they were not an operating entity. The process of Southern Railway System consolidation started in 1951 and was completed in 1959. Based on this consolidation, the Southern restates protestants' showing by deducting the sum of the freight gross ton-miles per mile of road together with the freight expense, rents, and taxes per mile of road for the following five roads: Alabama Great Southern, Georgia Southern & Florida, Cincinnati, New Orleans & Texas Pacific, New Orleans & Northeastern, and Southern. The average of the Southern Railway System (including all six roads) is added. Completing the formula the Southern shows 63.3 percent variable for southern region and 65.2 percent variable for the Southern Railway System.

Protestant bargelines also criticize the Southern's percent variable method because of the fact that the basic trend measure is total freight and passenger expenses (as adjusted to a common dollar basis) to one measure of performance; i.e., the trailing gross ton-miles in both freight and passenger services. They claim that this measurement is satisfactory only when dealing with a measurement of the variability trend as between roads of different densities, and then only after elimination of the short-haul carriers. This is the type of analysis made in statement 4–54. Actually, only a certain portion of operating expenses are treated as a function of gross ton-miles. Other elements of costs, in Rail Form A, are measured by such factors as cars handled and car-miles. The same type of measurement is also true as to passenger service.

In view of the foregoing, protestants show separately the data for trailing gross ton-miles in freight trains and passenger trains. Using the base period (1947–49) as an index, protestants show that in 1960 the index of freight gross ton-miles, with their high efficiency and low unit cost, was almost 100 percent as an index, whereas for passenger train service it was 60 percent. They conclude that over the period of time shown there was a maintenance of the level of the freight train volume with their efficient costs, and a substantial reduction in the passenger train volume of traffic with their higher level of unit costs, thus invalidating the type of comparison made by the Southern.

A brief examination of some of the studies made in the past, shows the percent variable to have ranged from 72 percent to 80 percent with the latter variable being widely used ever since its presentation in docket No. 29556 in 1948. Following the study made for docket No. 28300 (1939) wherein the percent variable for all class I railroads in the United States was found to be 76 percent, there was presented in document 63 (in response to Senate Resolution 119) a study covering the period 1935–41 which indicated a 72-percent variable for all class I roads in the United States. Later, in docket No. 29556, a study based on the period 1939–46 produced the currently used 80-percent variable figure. This was brought to date (1952) in ICC statement No. 4–54, and again shown to be 80 percent. Since the publication of that statement the Commission's cost finding section has made periodic tests, as well as analyses of variability studies presented in many formal proceedings. The findings of these tests and analyses have been to substantiate the general reliability of the 80-percent variable.

In analyzing the Southern's method for computing a percent variable it is noted that such studies should portray the variable and constant costs which are present at that density of traffic obtaining for the carrier or carriers for whom rates are being established. Further, it is to be noted that the degree to which costs are variable is a function of (*a*) time, whether "short" or "long term," and (*b*) volume of traffic handled; that is, when the volume of traffic reaches that density at which the maximum efficiency of operations is attained, and the law of decreasing costs is no longer operative, all costs become variable. Thus in the "long run" every item of expense is variable with traffic changes, but all items do not increase or decrease in direct proportion.

The criticisms by the bargelines concerning the Southern's use of the 20-percent fixed factor, and of a single measurement factor of trailing gross ton-miles, freight and passenger are valid. Additionally, the Southern did not provide data concerning the variability of its investment costs which are closely associated with operating expenses. The Southern has not shown that its use of an out-of-pocket percent variable of 70 percent is reliable and proper, or that the normal 80-percent variable is not reasonable. Consequently, the cost study introduced herein by the Southern results in a substantial understatement of its costs in hauling multiple-car shipments of grain.

Car utilization.—The degree of utilization of rail cars has a direct and substantial effect on the costs of providing rail service. A controversial issue is the utilization in annual mileage that may reasonably be expected in using the Southern's aluminum jumbo covered hopper cars to haul grain in multiple-car shipments.

Freight train car costs include maintenance, depreciation, and return on investment. Based on engineering studies maintenance expenses are divided between those associated with, or attributable to mileage (70 percent) and those associated with or attributable to time (30 percent). Similar studies on freight train car depreciation show these expenses to be split, 45 percent to mileage and 55 percent to time. Return on investment in freight train cars, under the usual Rail Form A application, is taken at 100 percent of the depreciated investment, and generally calculated at the rate of 4 percent, after Federal income taxes. When considering freight train car costs and particularly the mileage element in maintenance and depreciation expenses, it is apparent that car utilization is very important. Furthermore, as to the mileage element of these expenses, there is the consideration of the extent to which such expenses vary with use (car-miles). If the mileage portion of freight-train car maintenance expenses varies in direct proportion to the number of

car-miles, any increase in car-miles would have little or no effect on the out-of-pocket unit cost per car-mile for this portion. However, if the mileage portion of freight train car maintenance expenses does not vary in direct proportion to increments of car-miles the unit cost per car-mile will be different.

Car utilization also affects the time portion of car maintenance and depreciation expenses, as well as return on investment. Both the Southern and protestant bargelines adjust the time portion of such expenses to reflect their respective views as to the number of annual car-miles the jumbo cars will operate. The Southern contends, in treating the mileage portion of maintenance expenses, that their new jumbo covered hopper cars will run about 40,000 miles annually before they incur the same relative amount of mileage expenses (less certain expenses not applicable to jumbos) associated with the average annual car-miles of all cars on the Southern system. Based on special studies such average was found to be 16,425 car-miles. On the time side of car maintenance expenses, the Southern claims that the jumbo cars will be operated at the rate of 60,000 car-miles annually.

Protestant bargelines argue that the mileage portion of car maintenance expenses vary in direct proportion to the number of car-miles operated and that increased car-miles operated increase the maintenance expenses. Consequently, they do not adjust the mileage portion of these expenses in their rail study. They do reflect a possible increase in car utilization for the jumbo on the time side of car maintenance expenses, which they consider not to be variable with car-miles. In so doing they take the Southern system average annual car-miles for regular covered hopper cars of 20,852 miles, and divide it by 16,425 car-miles (annual average for all cars), thus providing a ratio of 1.27 which is multiplied by the actual car-miles to develop the equated car-mile divisor used for the time portion.

Shown below are the opposing views of the parties relative to car utilization as it affects maintenance expenses.

A	Annual car-miles, Southern Railway System	841,083,042
B	Average system car-miles, all cars	16,425
C	Average system car-miles, regular covered hopper cars	20,852
P/D	Per diem debit car-miles	14,076,143
CM	Car-miles	

I	Southern's Jumbo Car Maintenance Costs Running portion. (1)+(2).	(1) Mileage portion of running expenses: A-P/D×2.435 (40,000 CM to 16,425 CM) (2) Time portion of running expenses: A-P/D×3.653 (60,000 CM to 16,425 CM)
II	Protestants' Jumbo Car Maintenance Costs Running portion. (1)+(2):	(1) Mileage portion of running expenses: A (2) Time portion of running expenses: A×1.270 (20,852 CM to 16,425 CM)
III	Southern's Jumbo Car Maintenance Costs Switching portion—Interchange, and inter-intratrain. (1)+(2).	(1) Mileage portion of interchange, and inter-intratrain expenses: A-P/D (2) Time portion of interchange, and inter-intratrain expenses: A-P/D×3.653 (60,000 CM to 16,425 CM)
IV	Protestants' Jumbo Car Maintenance Costs Switching portion—Interchange, and inter-intratrain. (1)+(2).	(1) Mileage portion of interchange, and inter-intratrain expenses: A. (2) Time portion of interchange, and inter-intratrain expenses: A×1.270 (20,852 CM to 16,425 CM)

As to the car maintenance expenses applicable to road train to industry switching, the Southern and protestants both used a divisor of 3,536,778 cars, loaded and empty.

Car utilization also affects car depreciation costs. On this point the Southern considers depreciation to be essentially a time cost. Thus, after developing a specific depreciation expense for the jumbo, it divided by 60,000 car-miles to obtain the depreciation unit cost per car-mile applicable to the running, interchange, and inter-intratrain switching portions of these expenses. For the road train to industry portion of these depreciation expenses Southern used a divisor of 180 cars, loaded and empty, per year, based on a special study.

Protestant bargelines did not develop specific depreciation expenses for the jumbo cars but adjusted the Southern Railway System's depreciation expenses to reflect a higher depreciation expense for them. However, protestants maintain the mileage (45 percent) and time (55 percent) split. They used for the running, interchange, inter-intratrain switching portions of these expenses the actual Southern Railway System car-miles as a divisor for the mileage side, and increased the actual Southern Railway System car-miles by the ratio of 1.270 (20,852 to 16,425 car-miles) to develop the divisor for the time side. For the road train to industry portion of depreciation expenses they used 3,536,778 cars, loaded and empty, as a divisor. This amount was actual for the Southern Railway System.

As to return on investment, the Southern develops a specific investment expense for the jumbo cars, and uses the same service unit divisors as were employed by them in the time portion of their depreciation expenses. On the other hand, protestants adjust Southern Railway System investment expenses based on the relation of the investment in jumbo cars to the average investment for all Southern Railway System cars, and use the same unit divisors as were employed by them in the time portion of their depreciation expenses.

The Southern originally contended at the hearing that, based on studies of various cars in their service, the jumbo cars would be operated about 60,000 car-miles per year. At that time the Southern did not offer exhibits to support its claim but based it on the opinion that the jumbo cars would average a round trip a week. However, to be conservative the Southern used an annual car utilization of 40,000 miles in its original cost calculations.

Later the Southern introduced an exhibit showing their recent experience under section 22 rates which are the same as the proposed rates, and under tariff rates now in effect for single jumbo cars. The origin points used in these studies are Louisville and Cincinnati. Destinations for the section 22 rate study are the States of Virginia and North Carolina, and those in the other study are the States of North Carolina, South Carolina, and Tennessee. Under the section 22 rates the miles per car, as extended for a year, are shown to be 60,212; and based on experiences under presently effective tariff rates the miles per car per year are shown to be 39,079. Average weights per car shown by the studies are 200,773 pounds under the section 22 version and 205,900 pounds for the tariff rates.

According to the Southern the traffic pattern indicated in the above study is not to be expected if the suspended rates become effective. It expects a pattern which will involve Mississippi and Ohio River crossings, Chattanooga and other Tennessee River ports, as well as other origin points. The Southern further asserts that higher utilization will result from the many improvements installed on the jumbo car itself because there will be fewer days lost due to repairs and maintenance. Along with the improvements to the cars, the respondent claims that its large retarder yards will speed switching; and that the consolidation of

its specialized machine shops has resulted in a more efficient operation. Another assertion is that car detention will be reduced, because it should be able to move jumbo cars into a terminal, place them, and move them out within 48 hours. Also, it is said that movement of empties will be expedited.

The principal arguments of protestant bargelines are that the Southern's purported car utilization is not supported by fact; and that its adjustments to the jumbo car costs are not proper because they ignore the concept that the mileage portion of maintenance and depreciation expenses varies in direct proportion to car-miles.

Freight train car cost determinations are sufficiently complicated when there is available sound historical data. In the instant case the problem becomes acute because the Southern is proposing a relatively new service in new high investment, large capacity equipment on which no significant or dependable experience has been gained either as to future car utilization or the car expenses that might be associated with such utilization. Lacking reliable experience, operating and engineering judgments must be exercised.

Considering all facts of record we are of the opinion that: The Southern's new jumbo covered hopper cars will be operated on the average approximately 40,000 miles annually in the proposed service; the mileage portion of car maintenance expenses that might be associated with or attributable to a 40,000-car-mile utilization is indeterminable because of inadequate data, and the fact that reliable experience has not yet been gained; the mileage portion of car maintenance expense does, generally, vary in direct proportion to the number of car-miles, but such relation is necessarily based on a representative study of reliable data and experience (both as to car-miles and expenses) which is lacking herein; car depreciation expenses are initially accumulated on a time basis but assigned to mileage and time service units based on causative relations established by special studies.

In view of the foregoing conclusions our restatement of jumbo car costs is based on a utilization of 40,000 car-miles annually.

Cost studies for rail grain movements.—The cost studies submitted by respondents and bargeline protestants concerning rail movement of grain, fall into two general categories; namely, those dealing with Southern Railway System costs and those dealing with southern region costs. These categories are further broken down based on the type of unit costs developed and the manner in which these costs are applied to the traffic under consideration. Under Southern Railway System costs the Southern applied: (1) the out-of-pocket costs for jumbo cars to five-car shipments of 500 tons, and to the anticipated grain traffic in similar shipments; and (2) the out-of-pocket costs for the regular covered hopper cars and boxcars to grain traffic moving under present rates, with transit privileges.

The Southern in general relies on Rail Form A adjusted to reflect the use of jumbo covered hopper cars, regular covered hopper cars, and boxcars. An application of Rail Form A was made for the Southern Railway System composed of the Southern Railway Company; Cincinnati, New Orleans and Texas Pacific Railway Company; Alabama Great Southern Railroad Company; New Orleans and Northeastern Railroad Company; Georgia Southern and Florida Railway Company; and Carolina and Northwestern Railway Company. The expenses and statistics of these roads were combined as one set of totals and processed as such. In addition, intrasystem interchanges were eliminated, and 250 miles per intertrain or intratrain switch were used rather than 200 miles as provided in Rail Form A. Protestant bargelines, in their restatement, take no exception to these procedures. Otherwise, the Southern relies on

particular adjustments to Rail Form A and the bargelines generally rely on unadjusted Rail Form A procedures. As noted earlier, the Southern developed Southern Railway System unit costs for jumbo covered hopper cars, regular covered hopper cars, and boxcars. These service costs were stated at the out-of-pocket level using 70 percent variable, while protestants' out-of-pocket unit costs were on an 80-percent variable. Having developed their service unit costs, the Southern converted them to a traffic unit basis and applied them to the grain traffic involved herein.

In applying their system jumbo car costs, the Southern costed movements from St. Louis, Evansville, Cincinnati, Louisville, and Memphis to the 37 destinations in the South named in the proposed schedules. This initial cost application, which involved a total of 185 specific movements and maintained a way and through mile separation, developed the out-of-pocket cost for each individual 5-car multiple shipment (500 tons) between 2 points and compared these costs to the revenues based on the applicable rates in the tariffs under consideration. Revenue as a percent of cost is shown for each of the 185 movements, and as a total which the Southern found to be 145.9 percent.

Following the revenue to cost comparisons this respondent shows similar comparisons for anticipated interregional movements of grain in multiple-car shipments. Special studies were undertaken to develop the anticipated volume and number of multiple-car shipments that would have moved if the Southern's proposed rates had been in effect in 1960. The total revenues from this anticipated traffic are shown to be $5,085,870, with out-of-pocket costs of $3,500,470. After an adjustment of $11,017 to allow for anticipated movements in 10-car shipments, the Southern shows the revenue as percent of cost to be 145 percent.

The Southern's second application consisted of applying the costs for regular covered hopper cars and boxcars to 91 sample movements of grain traffic, under present rates, including transit privileges. These sample movements covered grain transportation (and transportation of resulting grain products ex-transit points) from East St. Louis, Evansville, Louisville, Cincinnati, and Memphis, during the calendar year 1960. The result of this cost application is a revenue to cost comparison showing revenues of $40,610, out-of-pocket costs of $29,589, and revenue as percent of cost to be 137 percent.

This respondent also submitted a restatement of southern region costs despite its argument that regional costs are not appropriate. It restates protestants' southern region costs to reflect 70-percent variable out-of-pocket the characteristics of the jumbo cars, and certain other costs. Having developed their line-haul costs (per way mile and through mile), and the terminal cost per car, the Southern applied such costs to specified short-line mileage blocks, increased for circuity, to develop for each mileage block the total out-of-pocket cost and revenue applicable to a 5-car consignment. A total of 18 specific mileage blocks are used, beginning at 350 short-line miles, and with increments of 50 miles ending at 1,200 short-line miles. A ratio of revenue to cost was computed for each of the 18 mileage blocks, and ranged from 1.313 for the 350-mile block to 1.355 for the 1,200-mile block, with the mean being established at 1.344.

The foregoing summarizes the Southern's rail cost presentation. Protestant bargelines follow a somewhat similar format in their rail cost studies, but develop out-of-pocket and fully distributed costs for both the Southern Railway System and the southern region. They convert these costs to a traffic unit cost basis and apply them to the traffic involved, using generally the same origins and destinations as respondent but with some additions. Revenue to cost comparisons are provided.

In the following table is shown a comparison of the out-of-pocket unit costs for jumbo cars by Rail Form A, schedule G cost groups, between the Southern, protestant bargelines, and our restatement. The purpose of this table is to portray the cost differences and provide a basis for the later discussion of these differences.

Comparisons of out-of-pocket unit costs, by Rail Form A, schedule G cost groups

Schedule G group No.	Item	Jumbo covered hopper cars		
		Southern	Protestant bargelines	Restatement
I	Freight train car expenses—running other than mileage cars—per car-mile:			
	Running service:			
	Other expenses (cents)	0.38306	4.06867	0.44618
	Depreciation	.62212	2.70383	1.09648
	Return on value	.20602	.62938	.30903
	Total	1.21120	4.40183	1.82167
	Interchange switching:			
	Other expenses	.03302	.03218	.03003
	Depreciation	.09498	.31275	.14550
	Return on value	.14732	.43779	.23098
	Total	.27532	.81269	.39651
	Intertrain and intratrain switching:			
	Other expenses	.02641	.06534	.03290
	Depreciation	.10365	.37332	.17770
	Return on value	.15812	.56877	.26718
	Total	.32818	1.00743	.50778
II	Other running expenses common to all cars—mileage and other—per car-mile:			
	Floating equipment running and train supplies and expenses	.01989	.05458	.05458
	Interchange switching	.00137	.00984	.00984
	Intertrain and intratrain switching	.00833	.06570	.06570
I & II	Sum of groups I and II per car-mile	3.13519	7.75107	4.23506
III	Remaining running expense per GTM (cents)	.20984	.22375	.22375
IV	Switching costs—road train to industry—per car	$5.39430	$5.87481	$5.87481
VI	Freight train car costs—road train to industry per car:			
	Other expenses	.34217	.61082	.61082
	Depreciation	1.48804	3.56708	1.46471
	Return on value	2.83706	5.72508	2.45315
	Total	4.66317	9.90738	4.53868
VIII	Station clerical, at origin or destination—per car	.73793	4.08295	.88117
XI	Train supplies and expenses per car (origin & term.)	.23563	.26806	.26806
XI	Station employees, special services—per car	$0.01330	$0.01774	$0.01774
XII	Gen. off. clerk, acct. claim work—per ton (not used to cost out the traffic) (cents)		.30867	.30867

The Southern and protestants developed freight train car expenses following generally the procedures of Rail Form A but with several adjustments. They differ in their use of the percent variable; jumbo car costs and car utilization; car costs allocated to switching among interchange, intertrain and intratrain, and road train to industry; treatment of per diem debit balances; and car detention.

Freight train car costs include maintenance, depreciation, and return on investment, and in the following discussion each is treated accordingly.

Initially the Southern and protestants developed maintenance expenses by eliminating expenses that would not be incurred by the jumbo hopper car. The Southern originally calculated its costs by deducting the per diem debit balance on the ground that such expenses were not applicable to the jumbo cars. How-

ever, it did not make any adjustment in the associated per diem car-miles. Protestants criticized this treatment contending that if the per diem debit balance were eliminated the related car-miles should also be deducted to prevent the unit costs from being understated. On rebuttal, the Southern attempted to deduct the related car-miles by dividing the net per diem rent of $899,874 by the current per diem rate of $2.88 per day, resulting in 312,456 per diem car-days. This in turn was multiplied by 45.05, the average car-miles per day on the Southern Railway System, equaling 14,076,143 net car-miles. Protestants made no such adjustment in their restatement because the number of actual car-miles associated with the per diem debit balance could not be determined by them.

Following this initial adjustment both the Southern and protestants follow Rail Form A. Car maintenance expenses were separated between the mileage and time portions, and the passenger portion of nonrevenue freight was deducted. The balances were further distributed between running and switching and then increased to include overhead. The out-of-pocket costs were developed at 70 percent by the Southern, and 80 percent by protestant bargelines.

Unit costs for the running portion of maintenance expenses were obtained by dividing the total out-of-pocket costs for the mileage and the time portion by the equated car-miles. The effect of the adjustments noted above shows the Southern's unit cost for the running portion as 0.38306 cent per equated car-mile as compared to protestants' unit cost of 1.06867 cents. The difference in the unit costs results from the use of the 70-percent and 80-percent out-of-pocket costs, and the number of equated car-miles.

The switching costs were separated among interchange, intertrain and intratrain, and road train to industry. Interchange, and intertrain and intratrain costs were reduced to a cost per equated car-mile, using the adjusted car-miles as a divisor. Total costs allocated for road train to industry switching (group VI) for both mileage and time portions were reduced to a unit cost using the number of cars loaded and empty as a divisor.

Protestants separated switching costs among interchange, intertrain and intratrain, and road train to industry by using the percentages originally developed by the Southern. These percentages totaled 90.092 percent for the mileage portion and 86.587 percent for the time portion. Eliminated was that portion applicable to less-than-carload handling since the jumbo cars would not be used in such service. Subsequently, the Southern on rebuttal equated these percentages to 100 percent.

The difference in the total out-of-pocket cost and the equated car-miles used in developing the maintenance unit costs (running and switching portions) as determined by the Southern, protestant bargelines, and our restatement are shown in the following table.

The Southern and protestants treated depreciation and return on investment similar to their respective treatments of maintenance costs. The Southern developed its costs based on a single car, while protestants increased the aggregate depreciation and return on investment expenses for the Southern Railway System to show these items as though all cars were the aluminum jumbo covered hopper.

The Southern computed depreciation and return unit costs, for the running portion, interchange switching, and intertrain and intratrain switching portions using 60,000 car-miles as the divisor. Group VI—road train to industry unit costs were based on 180 cars loaded and empty, the result of a special study.

Effect of jumbo car utilization on maintenance costs, running and switching portions

Item	Total out-of-pocket cost	Car-miles	Schedule G unit cost (cents)
I. *Jumbo maintenance costs—running portion*			
Mileage portion:			
Southern	$7,381,598	2,013,761,779	0.36656
Protestants	8,436,109	841,083,042	1.0030
Restatement	8,436,109	2,048,037,207	.41191
Time portion:			
Southern	498,520	3,021,056,202	.01650
Protestants	701,390	1,068,175,463	.06566
Restatement	701,390	2,048,037,207	.03425
II. *Jumbo maintenance costs—switching portion*			
A. Switching—interchange:			
Mileage portion:			
Southern	175,520	827,306,899	.02122
Protestants	180,717	841,083,042	.02149
Restatement	180,717	2,048,037,207	.00882
Time portion:			
Southern	356,471	3,021,056,202	.01180
Protestants	434,281	1,068,175,463	.04066
Restatement	434,281	2,048,037,207	.02120
B. Switching—intertrain and intratrain:			
Mileage portion:			
Southern	87,174	827,066,899	.01054
Protestants	89,756	841,083,042	.01067
Restatement	89,756	2,048,037,207	.00438
Time portion:			
Southern	479,407	3,021,056,202	.01587
Protestants	584,024	1,068,175,463	.05467
Restatement	584,024	2,048,037,207	.02852
C. Switching—road train to industry	*Cars loaded and empty*		
Mileage and time portion:			
Southern	2,402,350	3,536,778	$0.68434
Protestants	2,860,460	3,536,778	$0.81443
Restatement	2,860,460	3,536,778	$0.81443

Protestants in developing comparable units costs used the same equated car-miles, and number of cars loaded and empty as were used to develop their unit costs for maintenance. The percentage distribution of switching costs between interchange, intertrain and intratrain, and road train to industry were equated to 100 percent, whereas under car maintenance the mileage and time portions totaled 90.092 percent and 86.587 percent, respectively.

In our restatement of depreciation and return the procedure followed is essentially the same as used by the Southern. However, depreciation expenses are based on an 80-percent out-of-pocket percent variable. The service units divisor was 40,000 car-miles. For the road train to industry portion the divisor was 156 cars, loaded and empty. The figure was determined by dividing the total cars, loaded and empty, for the Southern Railway System (3,536,778) by the number of cars owned (55,229) and increasing the result (64.04) by the ratio of 2,435 representing the ratio of 40,000 miles to 16,425 miles.

Under the car maintenance portion of group VI expenses, freight train car costs, road train to industry, the Southern, protestants, and our restatement reflect a cost saving resulting from a tariff restriction of free time to 1 day for loading or unloading at origin or destination. In addition to this saving, the Southern also reflects a cost saving based on a purported expedited switching. Thus the Southern reduced the car maintenance portion of group VI expenses by 50 percent. Depreciation and return on investment unit costs were developed on the basis of special studies.

We agree with the method used by protestants to reduce the freight train car costs, road train to industry (maintenance, depreciation, and return on in-

vestment) by 25 percent based on the shorter free-time allowance. We also concur with their contention that the Southern's cost savings, based on the possible expedited switching of multiple jumbo car shipments, may not be realized since it would indicate either inefficiency of present operations or that special handling would prove detrimental to the switching of other cars.

The following tables contain data which illustrate the difference in the total out-of-pocket cost, car-miles, and cars loaded and empty, used in developing the depreciation and return on investment unit costs (running and switching portions) by the Southern, protestants, and in our restatement.

Effect of jumbo car utilization on investment, and depreciation costs, running and switching portions

Item	Total out-of-pocket cost	Car-miles	Schedule G unit cost (cents)
I. *Jumbo—return on investment, running portion*			
Mileage and time portion			
Southern	$124	60,000	0 20802
Protestants	6,722,373	1,088,175,463	.62933
Restatement	124	40,000	.30903
II. *Jumbo—return on investment, switching portion*			
A. Switching—interchange			
Mileage and time portion			
Southern	88	60,000	14732
Protestants	4,676,351	1,088,175,463	.43779
Restatement	88	40,000	.22098
B. Switching—intertrain and intratrain			
Miles, and time portion			
Southern	119	60,000	19812
Protestants	8,289,096	1,088,175,463	.58877
Restatement	119	40,000	.29718
C. Switching—road train to industry	*Cars, loaded and empty*		
Mileage and time portion			
Southern	511	180	$2 83706
Protestants	27,016,634	3,536,778	$7 63877
Restatement	511	156	$3 27353
I. *Jumbo depreciation costs—running portion*			
Mileage and time portion			
Southern	373	60,000	.62212
Protestants—mileage	19,718,500	841,083,042	2.3442
Protestants—time	3,839,180	1,088,175,463	.35941
Restatement	42	40,000	2.70383 1.06548
II. *Jumbo depreciation cost—switching portion*			
A. Switching—interchange			
Mileage and time portion			
Southern	51	60,000	.08286
Protestants—mileage	468,867	841,083,042	.05575
Protestants—time	2,748,237	1,088,175,463	.25709
Restatement	38	40,000	.31275 .14350
B. Switching—intertrain and intratrain			
Mileage and time portion			
Southern	62	60,000	.10365
Protestants—mileage	232,986	841,083,042	.02769
Protestants—time	3,691,978	1,088,175,463	.34563
Restatement	71	40,000	.37332 .17750
C. Switching—road train to industry	*Cars, loaded and empty*		
Mileage and time portion			
Southern	267	180	$1 48904
Protestants	16,824,136	3,536,778	$4 75691
Restatement	303	156	$1 94,595

The difference in units costs developed by the Southern and protestants for group II and group XI expenses are traceable to the percent variable and car utilization. Special services expenses are separated, as provided for in Rail Form A, 50 percent to the car portion (group XI expenses—train supplies and expenses) and 50 percent to the car-mile portion (group II expenses). The item of station employees, special services (also part of the group XI expenses) as developed by the Southern was accepted by the protestants but increased to 80 percent out-of-pocket costs.

To develop the group XI expenses, train supplies and expenses, and the station employees, special services, both the Southern and protestants use the same number of carloads, originated and terminated, to arrive at the cost per car. The unit costs per car for the Southern and protestants, respectively were: 0.235343 cent and 0.26906 cent for the train supplies and expenses portion, and 0.01559 cent and 0.01774 cent for the station employees portion. The per car-mile portion, (group II expenses) is reduced to a unit cost by the Southern using 2,396,017,243 equated car-miles as a divisor, as compared to 998,088,974 miles by the protestants, which results in a cost per car-mile of 0.01989 cent for the Southern and 0.05458 cent for protestants. The Southern's car-mile divisor is based on its total revenue car-miles (998,088,974) minus (14,076,148 per diem debit miles) multiplied by the ratio of 2.435 (40,000 car-miles to 16,425 car-miles). Protestants use 998,088,974, the actual total revenue car-miles including mileage cars (loaded plus empty).

In developing the remainder of group II unit costs, that is those costs related to interchange switching, and intertrain and intratrain switching, the Southern and protestants use the same service unit divisor, 998,088,974 total revenue car-miles. Thus, the cost per car-mile for interchange switching becomes 0.80187 cent and 0.88884 cent for the Southern and protestants, respectively, and the intertrain and intratrain switching costs per car-mile are 0.50933 cent and 0.56570 cent for them, respectively.

In our restatement we use protestants' costs, since we agree with them that special service expenses are variable with mileage rather than fixed in nature as was treated by the Southern; and that the Southern's treatment of the per diem debit balances and associated car-miles is improper.

Unit costs for group III expenses were developed in the same manner by the Southern and protestants. Both used the same number of service units and differed only in their use of the percent variable. Such costs per gross ton-mile for the group III expenses are 0.20084 cent for the Southern and 0.22375 cent for the protestants, because they used the 80 percent variable.

One of the major points of controversy between the Southern and protestants is the handling of switching costs at origin or destination. Essentially the Southern relies on adjusted Rail Form A switching costs, claiming a substantial reduction in switching costs due to the handling of multiple-car shipments. Protestants follow the normal unadjusted Rail Form A procedure asserting that such in fact measures those claimed cost reductions since the associated service units represent all sizes of shipments and cuts of cars.

The Southern computed switching costs for the jumbo hopper car by developing adjustment factors by which the average minutes per car switched in road train to industry, as developed in Rail Form A, could be adjusted to include consideration of the handling of 5-, 10-, or 20-car cuts in multiple-car shipments. Although adjustment factors were developed for the 10- and 20-car cuts, only the 65-percent factor developed for the 5-car cut was used in costing out switching at origin or destination. The 65-percent factor was based on a study made of the switching logs at 13 locations in the southeastern States. An examina-

tion of these switching logs on moves where only one car was handled in or out, revealed an overall average of 5.55 switching minutes per car for the one-car handling. In a similar manner the average switching minutes per car for 4 to 6 cars was 3.42 minutes, and for 17 to 23 cars it was 2.89 minutes. Thus the adjustment factor of 65 percent was computed by dividing 3.42 switching minutes per car required for the four- to six-car cut by the 5.55 switching minutes required for the one-car handling. This produced a 62-percent factor but was rounded off to 65 percent. The net effect of the adjustment reduces the switching costs at origin or destination from $5.222 per car to $3.3943 per car for the movement of the jumbo hopper cars in a five-car cut.

Protestants object to the Southern's application of the 65-percent factor to the average switching cost per car developed in Rail Form A. They claim, correctly, that in Rail Form A the cost is not based on handling a single car but is an average cost per car which includes the cost of switching single cars as well as multicar cuts. The Southern Railway System's figures already reflect, in the average cost, the economies of multiple-car switching since a substantial volume of coal and other commodities are normally originated and terminated in multiple quantities. Protestants contend that to develop an adjustment factor the Southern should have developed the information for all sizes of cuts and not just the three groups that were studied. The proper comparison, still limited to industry switching, would have been to compare the 3.42 minutes which were developed for the four- to six-car group with the average of all groups. Protestants contend that based on a study furnished by the Southern it took 19,341 minutes to switch 4,911 cars, for an average per car of 3.94 minutes. The adjustment factor then would be 87 percent in lieu of the 65 percent developed by the Southern.

The protestants point out that none of the 13 terminals studies were origin points of grain which would move under the proposed rates, and few of such terminals were destination points covered by those rates. They further criticize the switching study by stating that there is no analysis of the transfer movement and the classification service. In the absence of such studies protestants used in their restatement the average cost per car switched shown in Rail Form A, since it represents the average cost for all sizes of car cuts in classification, transfer, and the industry switching portion of origin and destination service. This results in a unit cost of $5.87481 per car.

The Southern in answer to the criticism that their study involved only industry switching, and did not include the classification and transfer, stated that the study was made to determine the relation between switching 1 car and switching cuts of 5, 10, or 20 cars and the only point at which this determination could be made was the industrial switching point itself. The Southern further asserted that the 65-percent factor is conservative, since the reduction in minutes involved in the classification and the transfer service should be greater than 35 percent.

We concur in protestants' analysis and in our restatement we adopt protestants' unit costs.

Aside from the Southern's use of 70 percent variable and protestants' use of 80 percent variable, the parties differ in their treatment of station clerical costs in other important respects. Respondents compute a unit cost per consignment by dividing the applicable station clerical expenses, $7,663,575 for the Southern Railway System, by the number of carload consignments, origin plus destination (2,024,686). The resulting unit cost per consignment (origin or destination) of $3.78507 was divided by 5 to obtain, for a five-car multiple shipment, a cost per car of $0.75701, origin or destination and $1.51402 for origin

and destination. Respondent claims this to be a proper procedure since the initial division, by the number of carload consignments (origin plus destination), provides the cost per consignment, and to reflect the cost per car, in the case of a five-car multiple shipment, it is only necessary to use 5 as a divisor.

Protestants, on the other hand, seek to develop that portion of station clerical expenses variable with cars and that portion which is variable with consignments. Briefly, their procedure is as follows: using the station clerical expenses of $47,487,466, and the total carload consignments, origin plus destination, of 10,814,353 from Rail Form A, Southern Region, 1959, they compute a cost per consignment, originated or terminated, of $4.39 and a cost per consignment, originated and terminated, of $8.78. Relying on Louisville & Nashville's study of station clerical expenses, which showed 22.15 rating and billing minutes for a single-car consignment, and using a rating and billing cost of $2 per hour, protestants arrive at a rating and billing cost per consignment of $0.74, which represents 8.6 percent of the total ($8.78) and is considered by them to be the portion variable with consignments. The remaining or "other costs" of $8.04 represents 91.6 percent of the total cost and is considered to be the portion variable with cars. As to that portion of the costs variable with consignments protestants also utilize from the Louisville & Nashville study, the additional (that is, the additional minutes above the 22.15 minutes per single-car consignment) rating and billing minutes per car of 8.50; 6.233; and 5.95 required for 5-, 9-, and 10-car shipments, respectively. These minutes per car when related to the 22.15 rating and billing minutes per a single-car consignment provide the ratios of 0.38375; 0.28140; and 0.26862 which are applied to the cost for a single-car consignment to determine the cost per car that is variable with 5-, 9-, and 10-car shipments, respectively.

Based on the foregoing data protestants apply the 91.6 percent (portion variable with cars) and 8.4 percent (portion variable with consignments) plus the applicable ratios to reflect the rating and billing minutes per car for 5-, 9-, and 10-car shipments used in connection with the portion variable with consignments, to the 1960 station clerical expenses for the Southern Railway System. The Louisville & Nashville study was based on the assumption that the number of minutes for rating a shipment is constant and measured the additional minutes required to prepare the additional documents in connection with multiple-car shipments. In this manner they developed the base figure of 22.15 rating and billing minutes for a single-car consignment; 93.50 additional minutes for a 20-car consignment; and 147.90 additional minutes for a 36-car consignment. Without the mechanics of the computations, this application produced a cost per car (variable with consignments) of $0.13886; and a total cost per car of $4.08295 at origin or destination, and $8.16590 for origin and destination.

Although the parties differ in their treatment of station clerical expenses, other than the percent out-of-pocket, they appear to be in agreement, and we concur, that account 373 is a hybrid account which requires a detailed study and analysis before a reliable determination of applicable costs can be made. Protestants in making use of the Louisville & Nashville study did attempt some refinement. They argue that the service units used, namely, the so-called carload consignments, origin plus destination, are in fact carloads originated and terminated, while respondent claims them to be as represented. We agree with protestants. Prior to the advent of multiple-car shipments there was support for the contention that carload consignments amounted to, and were in fact, a count of carloads originated and terminated based on the fact that one carload was analagous to one consignment. Today there remains a foundation for this conten-

tion because the reporting requirements in this area are substantially unchanged, thereby warranting the conclusion that the number of carloads originated and terminated continue to be reported. Thus, a five-car multiple shipment would probably be reported as five carloads, whereas if reported as a consignment it would be reported as one.

The foregoing is mentioned to indicate the catchall nature of account 373 and the reporting deficiencies relative to the service units associated therewith. It also supports our finding that the inherent nature of account 373 is such as to preclude an accurate determination of the applicable costs.

The Southern's method of dividing by 5 (cars) is improper for it assumes that the initial divisor reflects carload consignments, whereas in reality they are carloads, originated and terminated. Protestants' reliance on the Louisville & Nashville study, based on a time study at the local freight office at Louisville, is not reliable or representative of the Southern Railway System. Additionally there remains considerable doubt as to the validity of the percents variable (cars and consignments) developed therefrom. We are of the opinion that respondent's method understates the costs, whereas the protestants' method overstates the costs. The extent of each such deficiency is underterminable on this record. Notwithstanding, we have used the respondent's method, but at the 80-percent out- of-pocket level, in our restatement.

The Southern indicates a loss and damage cost per jumbo car of 21.8 cents but did not use this to cost out their traffic. Although protestants show 0.30867 cent per ton, they also eliminate such cost in costing out the traffic because of inadequate experience on the jumbo hopper car, and we do likewise.

Comparison of rail costs and revenues.—The Southern and protestant bargelines compare out-of-pocket costs, as each has developed them, with the revenues under proposed rates for 5-car shipments of grain averaging 100 net tons per jumbo car and transported from each of 5 river crossings to each of 37 representative destinations in the South (185 total routings) over Southern Railway System routes. Protestants show the same type of information for five-car shipments at the applicable minimum weight of 450 net tons per shipment in jumbo cars. Additionally, these parties show the cost to revenue ratios over the same routes for 500 net ton shipments, and the bargelines compute such ratios for shipments at the applicable minimum weight. We have computed data similar to that submitted by protestants, based on our restatement of rail costs. The aforesaid showings as to profitable and unprofitable routes, and revenue to cost ratios are set forth in the following tables. Our conclusion is that although transportation over the 185 representative routes would be performed at less than out-of-pocket costs on 20 routes (450-ton shipments) and 13 routes (500-ton shipments), the average revenue yield over all routes would be 118 percent and 125 percent for the 450- and 500-ton shipments, respectively.

In addition to the revenue to cost ratios shown in the foregoing table the record contains such relations for anticipated movements of grain by the Southern in five-car consignments. Based on movements in lots of 500 net tons, the Southern computes an average revenue out-of-pocket cost ratio of 145, and the protestant bargelines contend the ratio would be 100.2. Our restatement produces a ratio of 123.8. The Southern did not submit a computation based on anticipated shipments at the applicable multiple-car minimum weight of 450 tons. At such minimum the protestants compute a ratio of 93.6, indicating average movement at below cost. Our restatement shows a ratio of 116.8.

In addition to cost studies for movement of grain in jumbo cars the Southern

Number of routes with revenue equal to, above, or below out-of-pocket cost for transporting five-car multiple shipments from specified origins to the South

River crossings	Number of routes	Routes with revenue equal to or above costs			Routes with revenue below costs		
		Southern	Protestants	Restatement	Southern	Protestants	Restatement
450 tons per shipment							
Memphis	37		19	36		18	1
St. Louis	37		18	33		19	4
Evansville	37		3	22		34	15
Louisville	37		21	37		16	0
Cincinnati	37		17	37		20	0
Total routes	185		78	165		107	20
800 tons per shipment							
Memphis	37	37	25	36	0	12	1
St. Louis	37	37	20	35	0	17	2
Evansville	37	37	15	27	0	22	10
Louisville	37	37	34	37	0	3	0
Cincinnati	37	37	31	37	0	6	0
Total routes	185	185	125	172	0	60	13

Average percentage relationships (revenue to out-of-pocket costs) for five-car multiple shipments from specified origins to the South

River crossings	Number of routes	Average relation revenue to costs (percent)		
		Southern	Protestants	Restatement
450 tons per shipment				
Memphis	37		99	122
St. Louis	37		96	118
Evansville	37		87	106
Louisville	37		100	124
Cincinnati	37		98	122
Total routes	185		96	118
800 tons per shipment				
Memphis	37	153	105	130
St. Louis	37	146	103	125
Evansville	37	131	93	112
Louisville	37	153	107	132
Cincinnati	37	152	105	129
Total routes	185	146	102	125

and protestant bargelines submitted cost studies covering single-car grain movements in regular covered hopper cars and boxcars. By random sampling the Southern isolated 91 grain shipments from a total of 657 cars which had moved over its lines into the South in 1960. Since transit is permitted under present tariffs the Southern compiled related waybills showing movements prior or subsequent to the 91 sample movements. This involved a total of 490 cars and enabled a computation of the actual costs and related revenues for the complete movement of grain on the Southern Railway System. A comparison of the cost studies, and revenue cost ratios, as submitted by the Southern and protestants, is shown in the following table

Comparison of out-of-pocket costs and revenue to cost ratios as computed by the Southern and protestants

Item	Southern		Protestants	
	Boxcar	Regular covered hopper car	Boxcar	Regular covered hopper car
	Out-of-pocket unit costs			
Line-haul cost:				
Per ton-mile—way train (cent)	0.31577	0.31577	0.35510	0.35510
Per ton-mile—through train (cent)	0.18815	0.18815	0.20925	0.20925
Per car-mile—way train (cent)	15.04942	21.33428	16.98711	24.04848
Per car-mile—through train (cent)	10.54176	14.97882	11.83535	16.78514
Terminal:				
Cost per car	$40.11	$42.87	$44.57	$47.64
Other cost per ton (cent)	0.54018	0.54018	0.61734	0.61734
Other costs:				
Interchange cost per car	$5.39	$7.54	$5.99	$8.38
Grain doors	$14.07		$14.07	
Loss and damage per car	$4.45	$4.45	$3.73	$3.73
Total out-of-pocket costs	$29,589.60		$32,460.22	
Total revenue	$40,610.59		$40,610.59	
Ratio of revenue to cost	1.37		1.25	

The costs shown above by protestants provide the better and more reasonable measurement of the cost of handling the regular grain traffic. The Southern again is incorrect in using a 70-percent variable instead of 80 percent. It also errs in the development of the unit cost for the car-mile portion of special service. The method it used results in reduced unit costs as miles increase and would be proper only if the special service expenses were completely fixed and not related to the utilization of the equipment in service.

The Southern and protestant bargelines also submitted studies based on southern region rail costs. The study submitted by the Southern is for the sole purpose of rebutting protestants' study. Essentially, that respondent developed southern region out-of-pocket costs applicable to jumbo cars by following the same general procedures and adjustments it used in developing its Southern Railway System costs. The result of the study is an out-of-pocket mileage block cost scale, and a revenue to cost comparison which indicates a mean ratio of 1.344. Since there is available of record specific Southern Railway System costs for movement of jumbo cars over that rail system, it is inappropriate to apply southern region costs either to such movement or to movement over other routes for which there are no published rates for shipment in jumbo cars.

U.S. GOVERNMENT PRINTING OFFICE: 1983

APPENDIX F

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 21st day of January, A. D. 1963.

INVESTIGATION AND SUSPENSION DOCKET NO. 7656

GRAIN IN MULTIPLE-CAR SHIPMENTS—RIVER CROSSINGS TO THE SOUTH

It appearing, That by orders dated August 7, 1961, and August 28, 1961, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations stated in certain schedules described in said orders, and the operation of the schedules was suspended to and including March 9, 1962, and that the effective date was voluntarily deferred to and including August 7, 1962.

It further appearing, That federal court orders have restrained the proposed schedules from becoming effective, and said court orders remain in full force and effect.

And it further appearing, That a full investigation of the matters and things involved in this proceeding has been made, and that said Division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the said schedules to the extent found not shown to be just and reasonable, or otherwise lawful, to wit: the application of Item 200 in the tariffs and schedules as published by the Southern Railway System subject to minimum of 450 tons per shipment; those tariffs and schedules as published by the Southern Railway Sy tem subject to minima of 900 tons and 1,800 tons per shipment; and all tariffs and schedules as published by the other respondents herein; on or before March 8, 1963, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commisjson under Section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission, Division 2.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX G

Statutes Involved

The National Transportation Policy, 49 U.S.C. preceding sections 1, 301, 901, and 1001, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1(5), 49 U.S.C. 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1), 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 15(7), 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation,

or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 15a(3), 49 U.S.C. 15a(3), provides:

In a proceeding involving competition between carriers of different modes of transportation subject to

this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

APPENDIX H

Excerpt from letter dated September 14, 1964, from the Solicitor General to TVA's General Counsel:

Re: Cincinnati, New Orleans & Tex. Pac. Ry. v. United States, 229 F. Supp. 572 (S.D. Ohio)

* * *

. . . By way of explanation to the Court, I should like you to append the following comment to your jurisdictional statement:

> The Solicitor General, in recognition of the common practice in Interstate Commerce Commission cases and the TVA's interest and statutory responsibilities, has authorized an appeal by TVA, although it is contemplated that the position of the United States is likely to be materially different.

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45-324—64—1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (J.S. App. A, pp. 1a–13a) [1] is reported at 229 F. Supp. 572. The report of the Interstate Commerce Commission (J.S. App. C, pp. 15a–69a) is printed at 321 I.C.C. 582; the report of Division 2 (J.S. App. E, pp. 71a–149a) is printed at 318 I.C.C. 641.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325 to set aside an order of the Interstate Commerce Commission (J.S. App. D, p. 70a). The judgment of the three-judge district court (J.S. App. B, p. 14a) was entered on June 4, 1964, and a

[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by Arrow Transportation Company, et al.

notice of appeal was filed in that court on July 29, 1964, by the Interstate Commerce Commission.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56.

STATUTES INVOLVED

Section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)) reads as follows:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsover; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description.

The National Transportation Policy (49 U.S.C. preceding sections 1, 301, 901, and 1001) and sections 1 (5), 15(7), and 15a(3) of the Interstate Commerce Act (49 U.S.C. 1(5), 15(7), and 15a(3), respectively)

are set forth in Appendix G of the jurisdictional statement filed by Arrow Transportation Company, et al.

QUESTIONS PRESENTED

The Southern Railway System[1] and the other appellee railroads proposed drastically reduced rates on grain, at a level averaging 60% below the pre-existing rates, from certain midwestern river points to destinations in the southeast. The rates were constructed upon a formula containing a 240-cent minimum, applicable for distances up to 346 miles. The Commission concluded that the application of this 240 cent minimum to shippers at Tennessee River points who were substantially closer than 346 miles to the southeast destinations would result in undue prejudice to such shippers and in undue preference of shippers at Mississippi and Ohio River points. The Commission further concluded that the proposed rates, without the minimum and for other reasons would return to Southern only 102% of out-of-pocket costs and would not be adequately compensatory. The Commission directed cancellation of the proposed rates without prejudice to the publication of non-discriminatory rates which return overall 118% of Southern's out-of-pocket costs. The questions presented are:

(1) Whether the court below erred in determining

[1] The Southern Railway System is composed of the six railroads who filed the original complaint in the court below: the Southern Railway; the Cincinnati, New Orleans & Texas Pacific Co.; the Alabama Great Southern Railway Co.; the Georgia Southern & Florida Railroad Co.; the Carolina & Northwestern Railway Co.; and the New Orleans & Northeastern Railroad Co.

independently and as a matter of law that differences in the truck competition encountered by Southern at the preferred and prejudiced points constituted such a dissimilarity in transportation conditions as to preclude a finding that the 240 cent minimum as applied to shippers at the prejudiced points violates Section 3(1) of the Interstate Commerce Act; and whether the lower court, in setting aside the Commission's conclusion that the discriminatory rates violate Section 3(1), improperly shifted the statutory burden of proof.

(2) Whether the lower court erred in overturning the Commission's judgment as to the validity of the car-utilization figure used by Southern in its cost studies, and in setting aside the Commission's ultimate finding that the proposed rates had not been proved to be adequately compensatory.

(3) Whether the court below erroneously construed the Commission's decision as holding that the proposed rates must be increased to avoid unfair and destructive competition to the barge lines, and erred in concluding, on the basis of such erroneous construction, that such holding is in violation of Section 15a (3) of the Act.

(4) Whether the court below erred in substituting its judgment for that of the Commission and in holding that the findings made by the Commission are inadequate and not supported by substantial evidence of record.

(5) Whether the court below exceeded its authority in "permanently enjoining" the orders of the Com-

mission, instead of remanding the case to the Commission for further proceedings.

STATEMENT

This case involves the same drastically reduced rail rates on grain, initially proposed by the Southern Railway System, which were before this Court in *Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658. In the *Arrow* case, which was decided while the question of the lawfulness of the rates was still pending before the Commission, this Court held that the courts have no power to restrain new rates from going into effect at the expiration of the statutory suspension period of seven months. Subsequent to the *Arrow* decision, the Commission issued its report and order finding that, although a substantial rate reduction was justified, certain aspects of Southern's proposed rate schedule[1] were unlawful.

The expanding poultry industry in the southeast has, in recent years, accentuated the traditional grain deficit of that area and stimulated the movement of an increasingly large volume of grain from the midwest (J.S. App. C, pp. 26a–29a). Although both the railroads and the barge lines experienced an increase in their grain tonnage, the Commission found that the principal beneficiaries of the increased grain

[1] Although the rates actually went into effect prior to the time the Commission issued its final order, such rates were referred to by the Commission and will be described herein as the proposed rates.

traffic were the unregulated truckers,[4] who transport grain directly from the country elevators in the midwest to the southeastern destinations (*id.*, p. 28a). The stated purpose of Southern's proposed rate reduction was to meet that truck competition. Southern initially published the rates only from selected Ohio and Mississippi River points, and later agreed to publish the same rate schedules from the Tennessee River points.

The proposed schedule, which establishes rates at a level averaging 60% lower than the pre-existing rail rates, was originally published for the account of the Southern Railway System alone. Other railroads serving the southeast[5] later published competitive schedules,[6] but took no position as to whether the rate reduction should be approved. The proposed rates are based on a formula of .573 cents per ton

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[4] Under Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. 303(b)(6), truck transporation of agricultural commodities such as grain is exempt from Commission regulation except as to matters involving the qualification and hours of service of employees and safety standards.

[5] Including, among others, the Louisville and Nashville Railroad Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railroad Company, the Illinois Central Railroad Company, and the St. Louis-San Francisco Railway Company, appellees herein.

[6] The only significant difference in the rate schedule published by Southern and those published by the other railroads is that Southern's schedule would limit the applicability of the reduced rates to multiple-car shipments moving in five of its new jumbo covered hopper cars, while those of the other railroads contemplate multiple-car movements in nine ordinary covered hopper cars or boxcars.

mile, plus 42 cents for terminal services, subject to a 240-cent per ton minimum for all distances up to 346 miles. Upon the protests of numerous parties, including the competing barge lines, grain merchants located at the Tennessee River ports, and the Tennessee Valley Authority, all of the proposed rates were suspended for the statutory seven-month period and placed under investigation.

An exhaustive hearing was held before an examiner of the Commission. The examiner's recommended report was omitted, and on January 31, 1963, Division 2 of the Commission issued its report and order (J. S. App. E, p. 71a–149a). The Division concluded that Southern's proposed rates would be lawful, but that the same rates of the other railroads had not been shown to be lawful. Exceptions were filed by the protestants and by the other railroads, and on July 1, 1963, the entire Commission (with only the 3 members who comprise Division 2 dissenting) issued its final report and order.

The Commission concluded that in view of the rapidly growing volume of grain transported by unregulated truckers at low and unpublished rates a substantial rail rate reduction was warranted, and that such reduction should be approved both as to Southern and as to the other railroads serving the southeast. It noted that the proposed schedules eliminated or sharply curtailed various services[7] normally in-

[7] *I.e.*, under the proposed rates there are no transit privileges; connecting line switching charges are not absorbed; and the amount of free time allowed for loading and unloading of cars is sharply reduced.

cluded in rail grain rates, and that the new jumbo cars which Southern (but not the other railroads) proposed to use would probably result in significant economies (J.S. App. C, p. 39a).

Turning to the contention of the barge lines that the barge-rail routes through the Tennessee River ports were the low-cost mode of transportation, and that the reduced all-rail rates would deprive them of their inherent advantage of low cost in violation of the National Transportation Policy, the Commission found that on the basis of comparative fully distributed costs the barge-rail movements were the low-cost mode by a substantial amount (*id.*, pp. 31a–32a). The Commission concluded, however, that where as here the dominant competition is from an unregulated mode of transportation (*i.e.*, the unregulated truckers), the inherent advantages of competing regulated modes should be evaluated on the basis of comparative out-of-pocket costs, in order to enable at least one of the regulated modes to compete successfully. On the basis of out-of-pocket costs, the Commission found that the all-rail routes were the low-cost mode except as to certain port-to-port movements, and that the reduced rail rates thus did not violate an inherent low-cost advantage of the barge-rail routes (*id.*, pp. 32a–37a).

The Commission then discussed the contention of the barge lines that the proposed rates should be held to be a destructive competitive practice against the barge-rail routes, and found to the contrary (*id.*, p. 38a). As to the limited port-to-port routes of the barge lines alone, where even on an out-of-pocket cost basis

the barge lines are the low-cost mode, the Commission first noted that in view of its conclusion (discussed *infra*) that the drastically reduced rates must in any event be raised slightly in order to render them adequately compensatory, it was unnecessary to determine whether the rates as published would constitute destructive competition as to this limited traffic; and then specifically found that when raised to a minimum reasonable level, the reduced rates would not constitute unfair or destructive competition (*id.*, p. 40a).

The Commission thus "indicated its approval of a broad territorial grain rate adjustment" by the railroads (*id.*, p. 49a). It found, however, that the rate schedules as published were unlawful in two particular respects, and ordered that such unlawfulness be cured. It is the Commission's findings and conclusions on these two points which are at issue before this Court.

The Commission concluded, first, that the proposed rates as published would result in unlawful discrimination against shippers located at the Tennessee River ports, in violation of Section 3(1) of the Act, because of the provision establishing a 240-cent per ton minimum rate, applicable for all distances from 1 to 346 miles. Since the distance between the Ohio and Mississippi River points and the major grain markets in the southeast is substantially more than 346 miles, shippers located at those points would not be affected by the minimum and would receive the full benefit of the rate reduction. The Tennessee River ports, however, are located less than 346 miles from most of those same markets, so that the 240-cent minimum

would in fact be the applicable rate. The practical result is that shippers located at the Tennessee River ports would be charged a far higher rate per mile than their competitors located at the Ohio and Mississippi River points (*id*, pp. 40a–41a). This may be specifically illustrated by comparing the rates to the grain-consuming center of Dalton, Georgia, from Louisville, Kentucky (located on the Ohio River), and Chattanooga, Tennessee (on the Tennessee River). Louisville is located 351 miles from Dalton, and the rate under the proposed schedule would be 243 cents per ton; the rate from Chattanooga, which is located only 37 miles from Dalton, would be the minimum rate of 240 cents per ton.

The Commission found that transportation conditions at the preferred and prejudiced points are not sufficiently dissimilar to warrant the rate disparity. The Commission specifically found that "severe truck competition exists at the Tennessee River ports as well," and noted the long-standing rule that "a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice" (*id.*, p. 43a). The railroads were thus ordered to amend their rates so as to remove discrimination against shippers located at the Tennessee River ports (*ibid*).

Furthermore, the Commission found that the drastic 60% reduction proposed by Southern would result in rates which are not adequately compensatory. Its conclusion rested primarily upon its rejection of the car-utilization figure used by Southern in its cost computations.

Southern, in its cost studies, had assumed that its jumbo cars would attain a car utilization of 40,000 car miles annually. The Commission concluded, for reasons discussed more fully at pp. 18–19, *infra*, that such a high car-utilization figure was not justified, and determined that in its recomputation of costs the actual data supplied by Southern as to the annual utilization of its regular covered hopper cars should be used. Under the Commission's determination of costs, the proposed rates overall would return to Southern only 102% of out-of-pocket costs (*id.*, p. 49a). The Commission concluded that such a low level of return was inadequately compensatory, but indicated that in its judgment the rates would be adequately compensatory if raised to an overall level reflecting 118% of out-of-pocket costs. The rate level for which the Commission indicated its approval would still be an average of 53% lower than the pre-existing rail rates.

Accordingly, the Commission found the proposed rates not shown to be just and reasonable or otherwise lawful, and directed their cancellation without prejudice to the filing of new schedules in conformity with its conclusions (*id.*, p. 50a).

Southern, joined by various parties who supported the rate reduction, filed suit in the district court to set aside the Commission's order insofar as it requires elimination of the rate discrimination against the Tennessee River ports and cancellation of the proposed rate schedules. The other railroads filed a complaint attacking the Commission's finding of a

Section 3(1) violation but taking no position as to the proper level of rates. The Department of Justice filed an answer taking the position that the proceeding should be remanded to the Commission for additional findings as to the Section 3(1) question. Shippers located at the Tennessee River ports, the competing barge lines, and the Tennessee Valley Authority intervened and appeared in defense of the order. On May 20, 1964, the court rendered its opinion (J.S. App. A, pp. 1a–13a), concluding that the entire rate reduction was valid both as to Southern and as to the other railroads and that the Commission's order should "be permanently suspended, annulled, and enjoined." Its judgment (J.S. App. B, p. 14a) was entered on June 4, 1964. The effect of that judgment is that the full 60% reduction, including the 240-cent minimum, continues in effect both as to the Southern and as to the other railroads, a result which neither the Division nor the Commission had found to be justified.

THE QUESTIONS ARE SUBSTANTIAL

The issues in this case are of the greatest importance, both to grain shippers and to the carriers who compete for the grain traffic. At the time the record before the Commission was made, the annual movement of grain into the southeast was at least 8 million, and probably nearer 10 million tons (J.S. App. C, pp. 27a–28a). Prior to the proposed rate reduction, a substantial portion of that grain traffic moved to the southeast via the Tennessee River ports, and shippers and merchants located there have invested in

extensive grain facilities. The Commission found that the discriminatory rate schedule proposed by Southern would result in "a virtual embargo * * * on traffic moving from the Tennessee River ports to major markets", thus jeopardizing the value of existing grain facilities and conferring a windfall on their competitors located at Ohio and Mississippi River points (*id.*, p. 42a). Furthermore, regardless of whether the proposed rates infringe upon any legal rights of the barge lines, it is clear that, as a practical matter, rates which discriminate against the Tennessee River ports will seriously injure the barge lines serving those ports. We submit, that solely in terms of the economic impact of this case, review by this Court is warranted.

Moreover, we contend that the decision of the lower court is clearly erroneous in major respects.

1. The court below held that differences in the type of motor carrier competition experienced by Southern at the Tennessee River points, on the one hand, and the Ohio and Mississippi River points, on the other, constituted, as a matter of law, such a dissimilarity of transportation conditions as to preclude a finding that the rate disparity violated Section 3(1). In so holding, the court below departed from principles laid down by this Court, thereby improperly substituting its judgment for that of the Commission and diluting the protection against "discrimination in all its forms" which Section 3(1) was intended to provide.

Southern urged before the Commission, as well as before the lower court, that various distinctions between the types of truck competition encountered by it at the Ohio and Mississippi River points and that admittedly encountered by it at the Tennessee River points rendered competitive conditions so dissimilar as to warrant the discrimination in rates. Briefly stated, the distinctions drawn by Southern were that trucks moving from Tennessee River points perform shorter hauls than those from beyond the preferred points because of their closer proximity to the major markets, and that trucks moving from the Tennessee River points allegedly operate, for the most part, with a pay load in only one direction, while those from beyond the preferred points usually have a backhaul. Rejecting the contention, the Commission concluded (J.S. App. C., p. 43a) that:

> No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. * * *

The Commission's rationale, that neither differences in the type nor relative intensity of competition at the preferred points requires approval of otherwise discriminatory rates, is wholly supported by this Court's decisions. Under Section 3(1), a discrimination in rate treatment can be justified only by a showing of substantial dissimilarity in transportation conditions at the preferred and prejudiced points.

Atchison, T. & S. Fe Ry. Co. v. *United States,* 218 F. Supp. 359, 366 (N.D. Ill., 1963). The competition of motor carriers at the preferred points is a factor which may be considered in determining whether such substantial dissimilarity in transportation conditions exists. *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592 (1949). However, from the beginning, and without departure, this Court in construing Section 3(1) has said only that competition at the preferred points is a factor that may be considered—not one which must control in all circumstances. Thus, in leading *Interstate Commerce Commission* v. *Alabama Midland Ry.,* 168 U.S. 144, 167 (1897), this Court states:

> * * * we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." * * *

Later decisions reiterated that proof of competitive differences does not necessarily justify rate disparity. *Eg., Barringer and Co.* v. *United States,* 319 U.S. 1, 7 (1943); *United States* v. *Illinois Central R. Co.,* 263 U.S. 515, 525 (1924).

Moreover, the record, as reflected in the Commission's findings, indicates a more diffused and pervasive competitive situation at the preferred and prejudiced points than is suggested by Southern's sharp dichotomy between long-haul and short-haul motor competition. The long-distance, back-haul truck movement from the midwestern countryside, relied upon by Southern to justify its rate reduction, necessarily constitutes competition for the railroads at the Tennessee River points as well as at the Ohio and Mississippi River points. The unregulated trucks which Southern proved are the "dominant competition" do not originate at the Ohio and Mississippi River points themselves; they originate instead at country elevators throughout Ohio, Illinois, and Indiana (J. S. App. E, pp. 80a, 88a), and transport the grain all the way to the major markets in the southeast. Insofar as the railroads are concerned, such truck movements constitute competition at all terminal elevators where the railroads might otherwise obtain the shipment—including Chattanooga and other points on the Tennessee River, as well as such points as Memphis and Louisville, located on the Ohio and Mississippi Rivers. This competitive reality not only affords a fortiori support for the Commission's finding of a lack of "substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced," but also illustrates the seriousness of Southern's failure to maintain its burden of proof under Section 15(7)

of the Act that the rate disparity is reasonably related to a dissimilarity of competitive conditions."

In any event, the Court below in concluding independently that there existed such a dissimilarity of competitive conditions at the preferred and prejudiced points as to justify a drastic rate disparity, and in permanently enjoining the Commission's order, departed from the principle enunciated by this Court that "it is for the Commission, not the courts, to say whether [differences in competitive conditions] are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful." *Barringer & Co.* v. *United States, supra*, at p. 7.

The practical effect of the decision below is to virtually emasculate the protection against discrimination heretofore available to shippers and localities under Section 3(1). The prevalence at this time of varying types and degrees of carrier competition at different points would provide, under the decision, justification for widespread rate discrimination wholly without regard to the impact upon shippers. Cf.

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[10] The lower court appears to have improperly shifted the burden of proof to the injured shippers to prove that competitive conditions at the preferred and prejudiced points are similar, in clear contravention of Section 15(7). For example, the lower court reasoned that a finding of a Section 3(1) violation must be supported by findings "of discriminatory rate treatment under substantially similar transportation and competitive conditions" (J.S. App. A, p. 12a), and that "there is no showing" (*id.*, p. 10a) that the long-haul truck competition encountered by the railroads at the preferred points also exists at the Tennessee River ports.

Atchison, T. & S.F. Ry. v. *United States, supra.* A further effect of the decision below is to deny to the Commission any opportunity to approach experimentally, as it did here, the difficult competitive problems created by unregulated motor competition (J.S. App. C, pp. 49a–50a).

2. The lower court also erred in setting aside the Commission's finding that Southern had failed to prove that its drastically reduced rates would be adequately compensatory, as required by Section 1(5).

An important element in determining the cost of providing rail service is the degree of utilization of rail cars. In its cost studies, Southern had estimated that its jumbo cars would attain a car utilization of 40,000 miles annually, as compared with the 20,852 car miles attained annually by its own regular covered hopper cars. The Commission first noted that Southern was proposing a relatively new service in new equipment as to which no significant or reliable experience had yet been gained (*id.*, pp. 47a–48a). In addition, Southern's computations had been based upon two assumptions which, under the Commission's decision, were no longer valid; that reduced rates would not be approved for the other railroads, using ordinary covered hopper cars or boxcars, so that Southern would have a virtual monopoly on the available grain traffic; and that since the rates would be prohibitively high for the short hauls out of the Tennessee River ports, the jumbo cars would be used almost exclusively for the long hauls from the Ohio and Mississippi River points and thus attain a longer

average haul (*id.*, p. 48a). The Commission's conclusion that the same level of rates should be approved for all the respondent railroads, and that the discrimination against the Tennessee River ports was unlawful and must be eliminated, thus undercut the foundation of the high car-utilization figure.[11] In the absence of any reliable data as to the actual car utilization of the jumbo cars, the Commission determined that, in its recomputation of Southern's costs, the data supplied by Southern as to the annual utilization of its regular covered hopper cars should be used, and on the basis of that recomputation of costs found that the proposed rates would return to Southern overall only 102% of out-of-pocket costs (*id.*, p. 49a).[12]

This Court has repeatedly emphasized that the appraisal of cost studies is a matter of judgment which is "peculiarly within the competence of the Commission" (*Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481). The Commission's adjustment of Southern's car-utilization figure reflects an informed and pragmatic judgment which should not be set aside unless shown to be clearly erroneous. At this time we need only point out that if the Commission's finding of a violation of Section 3(1) is sustained by this Court (thereby making the jumbo

[11] The Commission noted further that, even if the 40,000 car-mile figure had been valid, the use made of it by the Division had resulted in a double exclusion of certain "nonapplicable" items of maintenance expense, thus necessitating adjustments in the cost computations (*id.*, pp. 48a–49a).

[12] On an individual basis, the yield would range from 75.89% to 121.82% of out-of-pocket costs. Approximately 32% of the individual rates would be *below* out-of-pocket costs.

car rates available to shippers at the Tennessee River points), its effect upon Southern's utilization of jumbo cars would alone invalidate the lower court's rejection of the Commission's findings as to the non-compensatory character of the rates.

3. The lower court further erred in misconstruing the Commission's decision regarding the issue of unfair and destructive competition. As noted *supra* at pp. 8–9, the Commission, in clear and plain language, *rejected* the contention of the barge lines that the proposed rates would deprive them of an inherent advantage of low costs and thus would constitute unfair and destructive competition. Despite the clear holding of the Commission, the lower court held that "the conclusion of the Interstate Commerce Commission that the proposed rates must be increased in order to avoid unfair and destructive competition * * * is invalid and must be set aside because the conclusion violates Section 15a(3) of the Interstate Commerce Act." (J.S. App. A, p. 13a). Since the Commission reached no such conclusion, the holding of the lower court is clearly in error and should be reversed.

4. Finally, in ordering that the order of the Commission be "permanently enjoined," the lower court misconceived its own function and exceeded its authority as a reviewing court. If there were error in the Commission's decision (which we deny), the proper remedy would have been for the court to remand the case to the Commission for further proceedings, consistent with the opinion of the court. See *Southern Railway Co.* v. *United States*, 376 U.S. 93, 119 (dissenting opinion).

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*

No. 545

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of Ohio

MOTION TO AFFIRM

SOUTHERN GOVERNORS CONFERENCE

SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS
Appellees

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No. 545

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of Ohio

---

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, the Southern Governors Conference and the Southeastern Association of Railroad and Utilities Commissioners, appellees, respectfully move that the judgment of the District Court be affirmed.

Identity of Appellees

Appellee Southern Governors Conference is a voluntary organization comprising the governors of sixteen states representing the ten southeastern states, three eastern border states, and three southwestern states. In freight rate matters it has traditionally represented only the ten southeastern states. In this proceeding and in the proceedings below the Southern Governors Conference represents the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Mississippi and Louisiana.

Appellee Southeastern Association of Railroad and Utilities Commissioners is a voluntary organization of the public utility regulatory bodies of these same southeastern states, who work with and implement the policies of the Southern Governors Conference with respect to transportation matters.

Appellees, Southern Governors Conference and Southeastern Association, have, for the past 25 years, actively endeavored to obtain reasonable and lawful freight rates from, to, and within the south. Appellees' efforts have not been made in behalf of any specific segment of the south's economy nor in behalf of any particular mode of transportation. These appellees have from time to time appeared in proceedings before the Interstate Commerce Commission and supported the position of the various modes of transportation, such as the railroads or water lines, governed by what appellees have considered to be in the best interests of the public as a whole throughout the South.

Appellees, Southern Governors Conference and Southeastern Association of Railroad and Utilities Commissioners, were intervening plaintiffs in the Court below and there supported the position of the original plaintiffs therein, Cincinnati, New Orleans & Texas

Pacific Railway Company, et al., appellees in this Court, who comprise Southern Railway System. These appellees also actively participated in the proceedings before the Interstate Commerce Commission.

STATEMENT AND ARGUMENT

Appellees, Southern Governors Conference and Southeastern Association of Railroad and Utilities Commissioners, hereby adopt and specifically incorporate as a part hereof the Statement and Argument as set forth in Southern Railway System Companies' motion to affirm, filed herein on October 29, 1964.

CONCLUSION

In accordance with said Statement and said Argument incorporated herein by reference, appellees, Southern Governors Conference and Southeastern Association of Railroad and Utilities Commissioners, submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

SOUTHERN GOVERNORS CONFERENCE
SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS
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Supreme Court of the United States

OCTOBER TERM, 1964

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*,

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants,*

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*

No. 545

INTERSTATE COMMERCE COMMISSION, *Appellant,*

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the Southern Railway System lines, appellees (hereafter collectively referred to as "Southern"), respectfully move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge District Court which, upon the suit of these and other appellees, annulled and enjoined an order of the Interstate Commerce Commission entered in *Grain in*

Multiple-Car Shipments — River Crossings to the South (321 I.C.C. 582; J.S. p. 15a *et seq.*).[1] The Commission had held unlawful, and had directed the cancellation of, certain rates published by appellees for the transportation of grain to consuming points in the Southeastern states. It had ruled that the illegality found could be cured only by (1) the publication of rates from one group of cities, found to have been unduly prejudiced, on a basis "no less favorable to shippers located thereat" than the rates available to shippers at another group of cities found to have been unduly preferred, and (2) a simultaneous increase in the entire rate schedule as thus adjusted by a minimum of 16 per cent.

This litigation has a lengthy history. It arose as a result of what both the court below and the Commission itself recognized to be a good faith effort by these appellees to combat the competition of the unregulated long distance "back-haul truckers" which, prior to the effective date of the rates, moved most of the vast and increasing volume of grain flowing from the grain producing Midwest to the grain consuming areas of the Southeastern states. (J.S. pp. 26a-28a, 38a). Because their charges for transporting grain are not subject to Interstate Commerce Commission regulation, and because their primary source of revenue is their original haul, these back-haul truckers were able to compete for this grain traffic on an altogether flexible basis, keeping their charges just low enough to secure the traffic, and without regard to the profitability of these charges since any revenue realized therefrom could at

[1] The citations to "J.S." are to the Jurisdictional Statement of appellants Arrow Transportation Company, et al.

least be offset against the necessary expenses incurred in the trip back home.

Prior to the publication of the rates which are the subject of this case, Southern's rate structure, geared to movements in conventional equipment and covering many elaborate special services, was not such as to constitute effective competition to this back-haul truck traffic. (J.S. p. 80a).[2] Aware that this rate structure was causing it to fall far behind the unregulated long distance back-haul truckers in the competition for the grain movement to the Southeast, Southern's management some years ago embarked upon an ambitious program of research and development designed to enable it to enter into successful competition with the truckers for this traffic. (J.S. pp. 19a-20a). This program, carried on over a period of years, resulted in the production of a new and revolutionary railroad car, characterized by the Commission in this case as a "technological achievement" and "a major breakthrough in the control of cost and a notable advance in the art of railroading." (J.S. p. 20a). The new car, made with an aluminum body and popularly known as the "Big John," has an empty weight little greater

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[2] Among these special services were transit privileges, whereby a grain shipment could be stopped by the shipper anywhere along its route from origin to destination for a commercial purpose, such as storage or processing. Each such transit stop in point of fact constitutes a delivery and reshipment of the grain, in connection with which the carrier incurs heavy terminal expenses. Transit shipments are additionally costly to the carrier because such shipments, involving an intermediate destination, tend to move by a much more circuitous route than would otherwise be the case. Another service customarily offered under the old rates was a relatively lengthy "free time" during which shippers could keep cars at origin, transit point or destination for loading or unloading without extra charge.

than that of the conventional box car, but is able to carry a grain load of over 100 tons in contrast to the approximately 50 tons that can be loaded in the conventional box car. (J.S. p. 20a). The Big John offers other cost-saving features as well—including automatic gravity unloading, separate compartments for loading different types of grain in a single car, freedom from rust, infestation and water damage, avoidance of the need for costly "grain doors," and lower maintenance costs. (J.S. p. 84a). Before the record before the Commission was closed, Southern had acquired 500 of these cars at a cost of thirteen million dollars. (J.S. p. 20a).

Taking advantage of this technological innovation, which put it for the first time in a position to publish rates to meet the long-distance back-haul unregulated truck competition that had become dominant in the transportation of grain to the Southeast, Southern published proposed reduced rates on grain from Cincinnati, Louisville, Evansville, St. Louis and Memphis to 37 destinations throughout the Southeast.[3] In order to achieve the maximum cost savings possible, the rates were made applicable only to shipments made in "Big John" cars (and then only with respect to movements of a minimum of 5 cars carrying at least 450 tons of grain); did not cover transit privileges; permitted only a short "free time" for loading and unloading; and were available only to shipments moving from one origin to one destination on one bill of lading from one consignor to one consignee. (J.S. pp. 17a, 74a).

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[3] The rates were subsequently published from certain Tennessee River points served by Southern, and to a large number of additional destinations, in accordance wi Southern's undertaking to provide, upon request, the same basis of rates to any and all origins and destinations served by it. The other railroad appellees involved in this case published comparable rates but, since they did not possess the Big John cars developed by Southern, made them applicable to movements in conventional cars. (J.S. pp. 44a, 74a).

The rates from and to all points were computed on the basis of a formula providing 42¢ per ton for terminal service plus .573¢ per ton mile and, in addition, a minimum charge of 240¢ per ton was established. (*Ibid.*) Since the purpose of the rates was to combat the altogether flexible and unregulated competition of the long distance back-haul trucker, the rate formula was designed to produce rates that would cover costs plus a reasonable profit for the anticipated hauls averaging about 600 miles.

The 240¢ minimum charge (applicable to hauls up to approximately 350 miles) was established for essentially two reasons: First, on shorter hauls Southern did not face unregulated back-haul truck competition, but rather an altogether different kind of truck competition dependent for its revenues on the grain haul alone. The minimum charge was low enough adequately to meet this competition on the movements that it would govern. Second, the minimum was established in recognition of the fact that hauls under 350 miles are relatively far more costly than long hauls, because of the much higher ratio of high cost terminal service to lower cost road haul service and because of the far lower degree of annual car utilization on short-haul routes. (I.C.C. Tr. 12187-88).

The rates were filed on July 11, 1961. Although they were warmly supported by the United States Department of Agriculture, the governors of the Southeastern states, grain consumers throughout the Southeast, and many shippers, they were protested by some shippers located at Tennessee River ports such as Guntersville, Alabama, and Chattanooga, Tennessee, and by certain barge line and other interests. On August 7, 1961, the Commission suspended the rates and insti-

tuted an investigatory proceeding with respect to them. Lengthy hearings, extending over 139 hearing days and resulting in a record of over 15,000 pages, were thereafter had. When the seven-month suspension period authorized under Section 15(7) of the Interstate Commerce Act expired prior to the conclusion of these hearings, some of the protestants succeeded in obtaining temporary injunctive relief from the courts and thereby prevented the rates from going into effect. This restraint was ultimately lifted when this Court held that the courts lack jurisdiction to extend the Section 15(7) suspension period, *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, and on May 11, 1963, the reduced rates finally became effective.

In the meantime, on January 21, 1963, Division 2 of the Commission, which has supervisory responsibility over railroad rates, ruled unanimously that Southern's reduced rates were lawful.[4] (318 I.C.C. 641; J.S. p. 71a *et seq.*). On petition for reconsideration, a divided full Commission on July 15, 1963, reversed the decision of Division 2.

The Commission held the rates to be in violation of Section 3(1) of the Interstate Commerce Act on the ground that they unduly prejudiced cities and shippers located on the Tennessee River and unduly preferred cities and shippers located on the Ohio and Mississippi Rivers. The basis for the Commission's conclusion was the fact that because the Tennessee River points are located less than 350 miles from some major

[4] As to the comparable rates published by the railroad appellees not part of the Southern System, which as noted above applied to movements in conventional equipment, Division 2 held that the proposed rates had not been shown to be compensatory. (J.S. p. 110a).

Southeastern grain consuming points, and the Ohio and Mississippi River cities more than 350 miles from those points, shippers from the Tennessee River cities would, by virtue of the 240¢ minimum applicable to hauls of approximately 350 miles or less, pay a higher per mile—although a lower total—rate for the rail transportation of grain to some Southeastern destinations than would shippers located at the Ohio and Mississippi Rivers.[5] The Commission ruled that in order to cure the illegality that it had found, the Southern must revise its rates so that the shippers at the Tennessee River cities would receive a rate "less favorable" than that received by shippers at the Ohio and Mississippi River points. (J.S. p. 44a). Since, as indicated above, the rates from the Tennessee River points to many destinations were already lower in absolute terms than those from the Mississippi and Ohio River points, this necessarily meant that the Southern was required to offer rates to Tennessee River shippers more favorable than those made avail-

[5] Contrary to the impression which appellants have sought to create, rail shipments from the Tennessee River points to grain consuming destinations in the Southeast are by no means all governed by the minimum. Many of these destinations are more than 350 miles from the Tennessee River. For example, whereas 90 of the destinations named in Southern's tariff are less than 350 miles distant from Chattanooga and governed by the minimum, the other 139 destinations are subject to rates that exceed the minimum.

By the same token, the minimum is by no means of merely theoretical application to shipments from the Ohio and Mississippi River cities to consuming points. Thus, for example, 20 grain consuming points named in Southern's tariffs are less than 350 miles from Memphis, 16 are less than 350 from Louisville, 11 less than 350 miles from Cincinnati and 6 less than 350 miles from Evansville. Grain shipments from those cities to these points thus move at the minimum rate.

able to shippers at the Ohio and Mississippi River points or, to state the matter in another way, that Southern could not offer long haul competitive rates without *pro rata* adjustment in its short haul rates.

The Commission then went on to hold that because the rate adjustment required by this portion of its order would substantially decrease the annual utilization of Southern's Big John cars and thereby substantially increase Southern's average per mile costs, and because in the Commission's view car utilization would, even apart from the rate adjustment ordered, be lower than the utilization figure used by the Southern in computing its costs, a restatement of Southern's costs was required. (J.S. pp. 48a-49a). In making this restatement the Commission used an annual utilization figure of approximately 20,800 miles, the average utilization figure for Southern's fleet of conventional covered hopper cars. In so doing it ignored both Southern's actual utilization experience with the Big John cars and the many other factors and circumstances which indicated strongly that Big John car utilization would run far higher than conventional hopper car utilization. On the basis of its restatement of costs by this extraordinary method the Commission determined that upon correction of the Section 3(1) violation that it had previously found, Southern's rates would return approximately 102 per cent of out-of-pocket costs. (J.S. p. 49a).[6]

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[6] The Commission had earlier concluded that because Southern's rates were published to meet unregulated truck competition, out-of-pocket rather than fully distributed cost was the standard properly to be applied in determining whether the rates were so unreasonably low as to be in violation of law.

The Commission then concluded that this return would render the rates unreasonably low in violation of Section 1(5) of the Act, and might well cause them to be unfair and destructive as to certain protestant barge lines in violation of the National Transportation Policy. It thereupon directed that Southern, after readjusting its rates to make them "no less favorable" to the Tennessee River interests, increase them across the board at least 16 per cent, and ruled that other railroad appellees might lawfully publish rates upon the same basis. (J.S. pp. 49a, 45a).

Although the Commission's opinion sought to minimize the significance of its action, the result of that action was to distort out of all recognition Southern's rate proposal. That proposal had been meticulously designed effectively to meet the particular and different competitive circumstances encountered by Southern with respect to long haul movements, on the one hand, and short haul movements, on the other, and to achieve maximum car utilization in order to reduce costs and rate levels as far as possible so that Southern might successfully and profitably compete for both kinds of movements. As ordered modified by the Commission, the rates would be lower than necessary to meet the competition found by Southern with respect to short haul movements and, in Southern's best judgment, no longer sufficiently low effectively to meet the competition found by it with respect to long haul movements.

These appellees and others brought suit before a statutory three-judge district court in Ohio to enjoin and annul the Commission's order. After a full oral hearing and the submission of extensive briefs, that court ruled that the Commission's order was invalid and could not stand.

As to the Commission's Section 3(1) determination, the District Court held that the conclusion constituted an abuse of discretion in light of the fact that those of the Commission's findings that found support in the record affirmatively showed a substantial dissimilarity of transportation conditions among the relevant points, whereas the finding primarily relied on to show a similarity of transportation conditions was without support in, and indeed was contradicted by, the evidence. (J.S. pp. 12a-13a). The Commission's conclusion that the rates were unreasonably low in violation of Section 1(5) was found by the court to be invalid because it was based on the rejected premise that Section 3(1) had been violated, and also because other cumulative grounds relied on by the Commission to support its conclusion that Southern's car utilization would be far lower, and its costs accordingly far higher, than shown by Southern's actual experience, were based on findings without substantial evidentiary support in the record. (J.S. p. 13a). Finally, the court ruled that the Commission's direction that the rates must be increased by 16 per cent in order to avoid "unfair and destructive competition" against the barge lines was inconsistent with Section 15a(3) of the Act, which forbids the Commission to hold rates of a carrier "up to a particular level to protect the traffic of any other mode of transportation," and was also without evidentiary support. (*Ibid.*).

ARGUMENT

The issues presented by these appeals are narrow and conventional. It is elementary that orders of the Interstate Commerce Commission, like those of other administrative agencies, to be valid must rest on clear and complete supporting findings, and that those findings must in turn be supported by substantial evidence. In this case the District Court correctly applied the foregoing rules to hold that the Commission's order requiring specified adjustments in Southern's rates lacks the essential support of adequate findings based on substantial evidence. Contrary to the suggestions of appellants (I.C.C. J.S. p. 12; J.S. pp. 20-21), the court has not affirmatively concluded that Southern's rates are valid or "sought to remove any factual issues permanently from the Commission's jurisdiction." Those rates remain carrier-made rates subject to further Commission action under appropriate conditions and circumstances. Compare *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 686. The court has held only that the Commission's decision, declaring the rates to be invalid for particular reasons and in particular respects, cannot stand. That holding, which enunciates no novel rule of law but is rather based on the deficiencies of the Commission's findings and their failure to reflect the evidence of record, raises no issue sufficiently substantial to require or warrant further argument in this Court.

1. The Section 3(1) Issue.

Section 3(1) of the Interstate Commerce Act forbids any common carrier to give any "undue or unreasonable preference or advantage" to particular persons or localities or to subject to "any undue or unreasonable prejudice or disadvantage" any person

or locality. It is settled law that a determination of undue or unreasonable preference or prejudice that violates Section 3(1) must rest on three essential elements: (1) a difference in transportation charges as between persons, areas or traffic; (2) injury resulting from the difference; and (3) substantial similarity of conditions and circumstances as between the persons, points or traffic allegedly unreasonably prejudiced and those allegedly unreasonably preferred. Although the third element is not stated in terms in Section 3(1), this Court has expressly ruled that in this respect Section 3(1) is to be construed *in pari materia* with Section 2 of the statute, which forbids discrimination as between shippers but only when there are "substantially similar circumstances and conditions." See *Baltimore & Ohio R. Co.* v. *United States*, 319 U.S. 1, 13. The Interstate Commerce Commission itself has on many occasions recognized that such is the proper construction of Section 3(1). See, *e.g.*, *Benzol Between Michigan and Ohio*, 200 I.C.C. 209 (1934).

In the instant case the Commission held that a violation of Section 3(1) of the Act existed by reason of the fact that although Southern's rates from all points were equal for equal distances, it had not made rates for short hauls from the Tennessee River points "no less favorable" on a per mile basis than those that it had made for long hauls from the Ohio and Mississippi River points.[7] The Commission thus ruled that any

[7] As indicated above (p. 7 n. 5) the rates also apply to long hauls from the Tennessee River, and to short hauls from the Ohio and Mississippi Rivers. In these instances, it is the latter shipments which are governed by the minimum, and the former that are unaffected thereby.

disparity of per mile rate treatment by Southern as between short and long hauls would be unduly prejudicial and preferential. It was this holding that the District Court held, on the evidence of record and the findings of the Commission itself, to constitute an abuse of discretion.

The court noted that the Commission had made certain findings demonstrating that transportation conditions as between the points of origin allegedly unduly preferred and those allegedly unduly prejudiced were in fact not similar. The most notable of these was the Commission's finding that, if Southern was required to establish rates from the Tennessee River points to the Southeast on the same per mile basis as its rates from its Mississippi and Ohio River points, the result would be drastically to decrease the average annual utilization of Southern's Big John cars. (J.S. p. 42a).[8] This conclusion necessarily recognized that Southern's costs in rendering short-haul rail service from the Tennessee River points to the Southeast would be substantially higher on a per-mile basis than its costs in rendering long haul service from the Mississippi and Ohio River points.

Even if other transportation conditions as between the groups of cities had been correctly found by the Commission to be substantially similar, the court would have been justified, by reason of this affirmative Com-

[8] The decrease in utilization would come about in part by reason of the fact that "turn-around time" would on short hauls such as from the Tennessee River points be approximately as great as that on far longer hauls.

mission finding as to an inequality of cost conditions and the long-standing rule that "any fact which produces an inequality of condition * * * justifies an inequality of charge," *I.C.C.* v. *Baltimore and Ohio R. Co.*, 145 U.S. 263, 284, in striking down the Commission's determination that Section 3(1) required short haul rates from the Tennessee River points "no less favorable" than the long haul rates from the Ohio and Mississippi River points.[9] In the instant case, however, the court properly found that an additional fundamental defect existed in the Commission's decision in that the finding primarily relied on by the Commission to show similarity of transportation conditions was not supported by substantial evidence of record.

The finding in question was as follows:

> "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prej-

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[9] A difference in cost has always been recognized as a fundamental difference in transportation conditions, negating any duty to maintain an equality of rates. See, *e.g.*, United States v. Illinois Central R. Co., 263 U.S. 515, 524:

> "* * * the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions * * *."

See also New York v. United States, 331 U.S. 284, 305; Increased Express Charges Within Eastern Territory, 300 I.C.C. 597, 610 (1957).

udice. *Mississippi Cotton Seed Crushers Assn. v. A., B. & C. R. Co.*, 238 I.C.C. 87, affirmed, 251 I.C.C. 643 (1942)." (J.S. p. 43a).

If this finding is interpreted to mean no more than that some kind of truck competition exists at the Tennessee River points as well as the Ohio and Mississippi River points, it provides no support for a conclusion as to substantial similarity of competitive conditions. Such substantial similarity is not established simply by the existence of competition at the various points, but only if any such competition as may exist is of a substantially similar kind. If, on the other hand, the finding was intended to mean that Southern faces substantially the same kind of truck competition at the former points as at the latter, it was invalid because unsupported by substantial evidence in, and, indeed, inconsistent with, the record.

Southern never contended before the Commission that truck competition did not exist at the Tennessee River points. Its position was rather that, unlike the situation at the Mississippi and Ohio, it was faced at the Tennessee River points not with the competition of back-haul truckers in a position to haul grain at rates not in themselves compensatory, but rather only with a far higher cost, empty-return operation performed mainly by truckers whose business was hauling grain or by grain receivers in their own trucks, and that the 240¢ minimum was sufficiently low adequately to meet this latter kind of competition.

The record before the Commission clearly established this dissimilarity between the truck competition at the Tennessee River points and that at the Mississippi and

Ohio River points. There was considerable evidence that grain movements from the Tennessee River were not handled by long-distance back-haul trucks but rather by empty-return trucking operations (*e.g.*, I.C.C. Tr. pp. 7010-11), and no significant evidence to the contrary.[10] This evidentiary picture was statistically confirmed by an exhibit graphically representing the charges for a representative number of truck shipments of grain from the Tennessee River to the Southeastern consuming areas, drawn from bills introduced by protestants themselves. The average truck charge shown by this exhibit was $3 per ton for a movement of 150 miles. This showing confirmed the judgment that had been made by Southern's Vice President, Robert S. Hamilton, in formulating the rates that "the possibility of a back-haul to pick up a low cost movement of exempt commodities does not reach a serious point until somewhere out to 300 or 350 miles," and that "figuring it on a round trip cost and a rather bare cost from 90 miles on out, the $2.40 minimum will be well under the cost of the truck operating with an empty return." (I.C.C. Tr. pp. 1998-99).

The record was thus clear that, contrary to the Commission's holding that the truck competition encountered by Southern at the Tennessee River and that encountered by it at the Ohio and Mississippi River demonstrated a "substantial similarity of transportation conditions," in fact the situation was quite the

[10] See also, *e.g.*, the statement in the brief to the Commission of appellant Cargill, Incorporated, dated November 5, 1962, at p. 101, that "almost exclusively the truck movement of the Tennessee River grain from the Tennessee River ports has been shown to be a movement with an empty return haul."

contrary.[11] In considering the validity of the Com-

[11] In implicit recognition that the Commission finding under discussion is in fact inconsistent with the evidence of record, both the Interstate Commerce Commission and the other appellants have in this Court virtually abandoned any effort to defend it in the terms in which it is written. Instead, they have sought to reinterpret the finding to make it mean that the Commission found that shippers at both the Tennessee and the Ohio and Mississippi Rivers are faced with the same "truck competition • • • of itinerant truckers who originate grain at points north and west of [the Ohio and Mississippi River crossings] and haul this grain through or around both these crossings and the Tennessee River ports."

This reading of the Commission's finding is not only entirely inconsistent with the testimony before the Commission of the barge lines serving the Tennessee River points that they had never felt the impact of any long back-haul truck competition (J.S. p. 116a), but is squarely contradicted by the very terms of the finding. The Commission's statement that "a carrier may not pick and choose the competition it will meet • • •" would have been wholly inapposite had the Commission been referring, as appellants now urge, to some sort of unitary competition from Midwest to Southeast, rather than to competition faced by appellees at the Tennessee River, on the one hand, and separate competition faced by them at the Ohio and Mississippi River on the other. Moreover, it will be noted that appellants' new interpretation of the finding requires the rewriting of the Commission's references to "competition at" particular points to read "competition through" and "around" those points. And finally, if the Commission had in fact been referring to long haul trucks loaded in the Midwest as constituting competition for shippers at the Tennessee and Ohio and Mississippi Rivers in the Southeastern grain markets, it would have been plainly immaterial whether those trucks moved "at," "through" or "around" the particular originating points served by Southern's rates. In short, appellants' argument is precisely the kind of "appellate counsel's *post hoc* rationalizations for agency action" that this Court has stated may not be used to justify an agency order. Burlington Truck Lines v. United States, 371 U.S. 156, 168.

Even as a post hoc rationalization, appellants' argument is without merit. The competition now claimed by appellants to have been found by the Commission is not transportation competition, the relevant Section 3(1) consideration (see Texas & Pacific R. Co. v. I.C.C., 162 U.S. 197, 234), but rather competition in the satisfying of consumer demand, unrelated to the method of transportation involved.

mission's determination that Section 3(1) required Southern to make rates on the same per-mile basis for short hauls from the Tennessee River as for long hauls from the Ohio and Mississippi Rivers, the court was thus faced with an affirmative Commission finding of substantial cost dissimilarities and a record requiring a conclusion that the substantial competitive similarities found by the Commission did not in fact exist. Under these circumstances the court was plainly correct in holding that the Commission's conclusions with respect to Section 3(1) were invalid and must be set aside.[12]

2. The Section 1(5) Issue.

As indicated above, the order of the Commission not only required a readjustment of Southern's proposed rates to make them "no less favorable" to shippers at the Tennessee River points, but also directed an across-the-board increase of the rates as thus adjusted by a minimum of 16 per cent. The expressed bases for the Commission's latter direction were its conclusions that the rates after the Section 3(1) readjustment could be expected to return to Southern 102 per cent of out-of-pocket costs, and that any rate structure which resulted in a return of under 118 per cent of out-of-pocket cost would be unreasonably low in violation of Section 1(5) of the statute and might constitute an un-

[12] The court had no occasion to, and did not, decide that transportation conditions between the longer and shorter hauls were in fact so dissimilar as affirmatively to justify the particular rate structure here involved. It rather held that the Commission's requirement of per mile equality was improper in light of its affirmative finding of a substantial dissimilarity in car utilization, and hence in cost, and in light of the absence of record support for its finding of substantial similarity of competitive conditions.

fair and destructive practice in violation of the National Transportation Policy. (J.S. pp. 40a, 49a).

When Southern originally formulated its rate proposal, actual experience with respect to the important cost factor of annual utilization was not available for Big John cars. Thus at the outset Southern relied on the best other available evidence to make the necessary informed judgment as to utilization under the rates. In doing so, Southern started from the fact that its utilization experience with *conventional* covered hopper cars showed a per car utilization of approximately annual 20,800 miles. (J.S. p. 135a). It was readily apparent that under the proposed rates Big John utilization would be very much higher for the following reasons, among others: a relatively long average haul; no delays for in transit processing; a free loading and unloading time substantially shorter than that applicable under conventional rates; movement in 5 car lots from one consignor to one consignee under a single bill of lading, with corresponding utilization efficiencies; and, of great significance, a substantially reduced rate level most attractive to shippers and certain to give Southern a substantially increased participation in a very large traffic movement. (J.S. pp. 136a-137a).

On the basis of all these considerations, it was the expert judgment of Southern's management that under the new rates Big John utilization would run in the neighborhood of 60,000 miles per year. In order to state its costs on a thoroughly conservative basis, Southern employed for this purpose a 40,000 car miles per year figure. (J.S. 137a).

As noted, at the outset it was necessary for Southern to make this judgment without the benefit of ac-

tual experience. Before the administrative record was closed, however, there had become available to Southern, and had been placed on the record, actual utilization figures showing that Southern's judgment had indeed been conservative. These figures were derived from the movement of Big John cars in hauling grain for the United States under Section 22 rates substantially similar to the rates here at issue, and also from the movement of those cars in carrying grain in single car shipments at substantially higher rates. The studies showed that under Section 22 rates the Big Johns moved at a rate of 60,000 car miles annually, and that even hauling grain at substantially higher rates and on a single car basis they moved at a rate of almost 40,000 car miles annually.[13]

Recognizing the significance of these factors, Division 2 found it appropriate to state Southern's costs on the basis of a 40,000 mile annual car utilization. On the basis of this figure, Division 2 found that the rates would return 118 per cent of Southern's out-of-pocket costs. (J.S. p. 109a).

The decision of the Commission not only flatly rejected the 40,000 mile utilization figure, but substituted for it the altogether irrelevant figure of approximately 20,800 miles that had been the experience with Southern's conventional covered hopper cars moving under altogether different rates and rules and, for the most part, handling shipments of commodities other than grain. The only reasons given by the Commission for its action were (1) that the Section 3(1) adjustment, by increasing the ratio of short to long hauls, would

[13] Some of the appellants claim that this evidence was "completely exploded" in the evidentiary hearing. (J.S. p. 17). Neither Division 2 nor the Commission so found.

diminish car utilization, and (2) that utilization would be additionally decreased by reason of the fact that under the Commission's decision other railroads as well as Southern would be permitted to publish rates on the same basis. (J.S. 48a-49a). The Commission's decision contains no explanation for its total disregard either of the many factors indicated above which showed that Big John utilization under the proposed rates would of a certainty be substantially higher than conventional covered hopper car utilization, or of the actual experience of Southern in the utilization of the Big John cars.

Since the Commission's conclusion that Section 1(5) required a 16 per cent increase in Southern's return level thus rested expressly on its utilization determination, and since that determination in turn was expressly predicated on the Commission's assumption that a readjustment of Southern's rate structure would take place in light of its Section 3(1) ruling, the Commission's Section 1(5) conclusion necessarily fell when its Section 3(1) ruling was reversed. The District Court was plainly correct in so ruling.[14]

Additionally, and even apart from erroneous reliance on the Section 3(1) ruling, the Commission's

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[14] The District Court also concluded that necessary subsidiary findings were lacking for the Commission's suggestion that the cost restatement used in the report of Division 2 "failed to give sufficient consideration" to the prior exclusion of certain items of maintenance expense. The validity of the court's conclusion is difficult to dispute since the Commission made no findings whatever in support of its suggestion. In any event, however, the validity of that conclusion is irrelevant to the correctness of the court's decision, since the adjustment implied by the Commission's suggestion would have only *de minimis* consequences, amounting to about 4/1000ths of a cent a ton mile, or considerably less than one per cent of the ton mile charge upon which the rates were constructed.

utilization conclusions were defective, as the court found, by reason of the Commission's failure sufficiently to justify them by adequate findings having support in the record. (J.S. 11a-12a). The Commission's facile suggestion that its use of a utilization figure of 20,800 miles was additionally justified because, under its decision, railroads other than Southern would also be publishing comparable rates ignored, without explanation, the fact that Southern's utilization figures were from the first predicated upon the conservative assumption that other railroads would be publishing such rates and that Southern would enjoy only 16 per cent of the total traffic. (I.C.C. Exs. 68, 503). In announcing its utilization figure, the Commission also simply ignored, and once again without any explanation, the vital differences between Big John car movement under the proposed rates and conventional covered hopper car movement under altogether different circumstances which on their face demanded a conclusion that utilization would be far higher in the former instance. This failure of the responsible agency to tender any rational support, by way of subsidiary findings, analysis of the evidence, or otherwise, for the utilization figure that was the basis for its Section 1(5) conclusions in itself—and quite apart from the fatal defect, discussed above, in those Section 1(5) conclusions by reason of their erroneous assumption of a Section 3(1) violation—precluded acceptance of those conclusions by the court below.[15]

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[15] The Commission's complete silence on the matters under discussion is particularly striking in light of the attention specifically directed to them in the dissenting opinion of Commissioner Freas:

> "It would appear that the majority's ultimate findings rest solely on its 20,852 car-mile utilization figure, a figure I believe is patently unsound. Can it really be believed that the involved equipment, requiring less maintenance, less switching, and no transit, and developed for long-haul

3. Section 15a(3).

Appellants attack at considerable length the additional ruling of the District Court that the Commission determination that a 16 per cent rate increase was necessary to avoid unfair and destructive competition in violation of the National Transportation Policy itself violated Section 15a(3) of the Interstate Commerce Act. The basis for appellants' attack is their assertion that the Commission did not in fact rely on the ground stated in directing the 16 per cent rate increase.

It is evident that if the decision of the District Court is otherwise correct, this attack of appellants is directed to an issue that is wholly academic. The predicate of the attack is the proposition that the Commission in fact directed an increase in Southern's rates solely in order to remedy a Section 1(5) violation. As we have shown above and as the District Court held, if appellants are correct in this assertion, the Commission's order requiring a rate increase must be set aside because it rests on assumptions as to car utilization which erroneously assumed a Section 3(1) violation and were otherwise defective. Accordingly, even if appel-

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through volume traffic solely on respondent's lines, would result in a figure the same as that applicable to conventional equipment utilized on and off 'owning lines? I think not. Indeed, the Southern's proposal here would lessen the persistent car supply problem plaguing the rail carriers, particularly the grain lines.' Respondent Southern's car utilization figures were based on actual experience, and were properly projected in special studies. It was demonstrated, and the division report so noted, that this equipment accrued greater mileage and hauled greater tonnage in the 2-year period since their acquisition than did conventional equipment in 10 or 15 years, or in 15 to 20 years, respectively. Actually, the division's 40,000 car-mile figure constituted a very conservative judgment, and there is some support for respondent's 60,000-mile figure." (J.S. pp. 55a-56a).

lants' argument on the point under discussion were to be accepted *in toto*, that fact would provide no basis for disturbing the decision of the court below.

It may be noted, however, that apart from its other deficiencies the Commission's conclusion that Southern's rates must be raised by a minimum of 16 per cent in fact does raise grave questions under Section 15a(3) in light of this Court's recent unanimous decision in *I.C.C.* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744. The Commission expressly found that by reason of the fact that Southern's rates were published in good faith to meet the dominant competition of an unregulated mode of transportation (long distance back-haul truckers), the question of inherent advantage as between Southern and the barge line protestants was properly to be determined on the basis of out-of-pocket costs. (J.S. p. 32a). It further found that on this basis Southern's all-rail routes had a clear over-all cost advantage as against the barge-rail routes. (J.S. p. 34a). In light of these findings the Commission's conclusion that a rate structure returning to Southern 102 per cent of cost, and thus compensatory, would nevertheless be unreasonably low because of its potential effects on the barge lines appears to fly directly in the face of the policy of Section 15a(3), emphasized in the *New Haven* case (372 U.S. at p. 757):

> "to permit the railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed."[16]

[16] In this connection it is altogether irrelevant whether the Commission sought to justify its requirement of an increase by reference to the National Transportation Policy or to Section 1(5), since in either event the question would be whether the policy of Section 15a(3) is thwarted by requiring a carrier to increase an already compensatory rate for the purpose of holding an umbrella over other forms of transportation.

The problem under Section 15a(3) is particularly acute where, as here, the Commission requires a very substantial increase over an already compensatory rate to a specific level (here 118 per cent of cost) without more than the most perfunctory and inadequate attempt to justify that level. The Commission gave only three reasons for selecting the 118 per cent figure. (J.S. p. 49a). The first of these, that it had been the figure shown by Division 2's costs calculations, merely reposes the question and does not begin to answer it. The second, that the Southern itself would regard a return of 102 per cent as inadequately compensatory, is simply incorrect. And the third, that even at that over-all level the rates would not recover out-of-pocket costs on some point-to-point movements, supports not the conclusion reached but if anything a conclusion that certain point-to-point adjustments might be required. The glaring deficiencies in these subsidiary findings would fully justify a ruling that the Commission here acted in violation of Section 15a (3), if, contrary to fact, such a ruling was necessary to a determination of this case. They are additionally significant in showing the essential arbitrariness of the Commission's action under Section 1(5) in holding insufficiently compensatory any rate below a level which, so far as the Commission's findings show, was selected on no more solid basis than caprice.

4. The District Court's Disposition of the Case.

The final argument of the appellants, that the action of the court in enjoining the Commission's order rather than remanding the case to the Commission for further proceedings consistent with its opinion exceeded the court's authority, is wholly without merit. The court has not affirmatively validated the rates here at issue, but rather has only held that on the record

before it the Commission's reasons for requiring particular adjustments in the rates were insufficient. The court's judgment enjoining the Commission's order does not insulate the rates from such further action as the Commission may see fit to take in the premises. Where, as here, an order of the Commission is set aside by a court by reason of deficiencies in findings or evidence, the Commission may, irrespective of whether the matter is remanded for further proceedings, take any further action with reference to the subject matter of its order that it may deem appropriate, including a reopening of the proceeding for the taking of additional evidence and the rendering of new findings. See, *e.g., Florida* v. *United States*, 282 U.S. 194, 215; *Erie R. Co.* v. *United States*, 64 F. Supp. 162 (S.D. Ohio 1945).[17]

[17] This fact disposes of the argument made by the appellants other than the Commission (J.S. p. 21) that serious questions exist as to the legality of the rates published by the other carrier appellees for transportation in conventional covered hopper cars. Nothing in the District Court's disposition of the case precludes the Commission from taking such action as to these rates as it might deem appropriate.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

No. 545

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

On Appeals from the United States District Court for the Southern District of Ohio

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MOTION TO AFFIRM

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IN THE

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v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

On Appeals from the United States District Court for the Southern District of Ohio

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MOTION TO AFFIRM

The City of Cincinnati, a party plaintiff below, and appellee here, pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, respectfully moves, for the reasons and on the grounds stated in the mo-

tion to affirm filed on October 29, 1964, by Southern Railway System lines, that the judgment of the District Court be affirmed.

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In the Supreme Court of the United States

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THE CINCINNATI, NEW ORLEANS, AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MEMORANDUM FOR THE SECRETARY OF AGRICULTURE

The Secretary of Agriculture, in intervening as a plaintiff in the District Court, acted pursuant to § 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. § 1291), and § 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089, 7 U.S.C. § 1622); see also, *Sec-*

retary of Agriculture v. *United States*, 347 U.S. 645, 647, fn. 1; *Secretary of Agriculture* v. *United States*, 350 U.S. 162, 163, fn. 1.

The Southern Railway System [1] filed a complaint in the District Court to set aside the order of the Interstate Commerce Commission with regard to the Southern's proposed rate reductions for the hauling of grain in multiple-car shipments to points in the Southeastern States. The Louisville and Nashville Railroad Company and other principal railroads serving the Southeastern area filed an intervening complaint to obtain judicial review of the Commission's order. Some additional parties, including the Secretary of Agriculture, intervened as plaintiffs and adopted the position of Southern.

1. The Southern's reduced rates are for shipments of not less than 450 tons of grain—90 tons per car—from one consignor to one consignee on one bill of lading.[2] The rates are constructed on a formula which contains a 240-cent minimum for distances up to 346 miles. The Southern-owned cars which would be utilized are extra large aluminum covered hopper cars with four separate compartments. At the time

[1] The Southern Railway System is composed of six railroads, *viz.*, the Southern Railway; the Cincinnati, New Orleans & Texas Pacific Company; the Alabama Great Southern Railway Company; the Georgia Southern & Florida Railroad Company; the Carolina & Northwestern Railway Company; and the New Orleans & Northeastern Railroad Company.

[2] The rates for the Louisville and Nashville Railroad and the other intervening railroads are subject to a minimum of 50 tons in conventional cars with a minimum of 450 tons per shipment.

of the administrative hearing, the Southern had approximately 500 aluminum covered hopper cars—sometimes referred to as jumbo or "Big John" cars—representing an investment of about 13 million dollars (J.S. App. 19a–20a).[3]

Each aluminum hopper car handles a revenue load in excess of 100 tons (J.S. App. 19a–20a). A standard box car has a gross weight of 128,000 pounds and a tare weight of about 24 tons (J.S. App. 84a). Grain must be loaded through the center door of a standard box car, then manually carried, by means of piping, to the ends and corners of the car, and unloaded through the center door (J.S. App. 84a). But a jumbo or "Big John" aluminum covered hopper car is loaded by means of a spout which is inserted after the watertight hatch covers are laid back, the four compartments in the car are quickly filled with grain, and the car is unloaded by opening the bottom so that the grain runs out by gravity (J.S. App. 84a). An aluminum hopper car is free from insect infestation and may be used again and again without cleaning or conditioning (J.S. App. 84a). Four types of grain may be loaded in a hopper car, whereas it is not possible in a standard car (J.S. App. 84a). A paper grain door is necessary in a standard car to prevent spillage, but it is not necessary in a hopper car (J.S. App. 84a). Aluminum cars will not rust and require minimal maintenance, although the number of tons

[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Arrow Transportation Co., *et al.*, appellants.

hauled in a 2-year period by a hopper car is more than would move in a standard car in 15 or 20 years (J.S. App. 84a). Less switching is involved in the use of a hopper car since more grain moves in fewer cars (J.S. App. 84a).

The Commission referred to the use of these large aluminum covered hopper cars as constituting a "technological achievement" (J.S. App. 20a). "We have no hesitancy in finding," said the Commission, "that the 'Big John' car represents a major breakthrough in the control of cost and a notable advance in the art of railroading" (J.S. App. 20a). The Southern should be able, according to the Commission's decision, to transport grain in these cars "at rates lower than would otherwise be prudent or lawful" (J.S. App. 20a).

The reduced rates by Southern, in the use of aluminum covered hopper cars, are of particular significance since the agricultural industry in the Southeastern area has been undergoing, in the last 25 years, basic changes which are reflected in the growth of a substantial livestock and poultry economy.[4] The grain requirements in the Southeastern area greatly exceed the local production of grain, and the deficit position requires the shipment to that area of large quantities of grain (J.S. App. 97a–98a).

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[4] Any increase in the multiple car rail rate would increase most grain transportation charges to the Southeastern area. Such an increase would be directly felt by farmers and feed mills in the area (Tr. 610–611, 973, 1413, 1452, 1473, 1743–1744, Ex. 32).

The Commission found that in 1960 the grain shipped to the Southeastern States totaled 10,719,000 tons, and of that total 6,560,000 tons moved from the producing area by motor trucks, and 4,159,000 tons moved by rail and water carriers (J.S. App. 27a). The motor trucks hauled only 700,000 tons to this area in 1955, but in 1960 they hauled "from about 4 million to more than 6 million tons and more probably nearer the latter figure" (J.S. App. 27a–28a). The percentage of grain shipped by railroad to the Southeastern region declined from 56% in 1955 to 20% in 1960, and the percentage hauled by motor trucks increased from 19% in 1955 to 60% in 1960 (J.S. App. 98a).

The proposed rates, according to Southern, are necessary "if it is to participate effectively in the grain movement" (J.S. App. 98a). "In view of our finding herein that unregulated trucking is the dominant competitive force, we are satisfied"—said the Commission—"that the Southern was motivated primarily by a desire to meet such competition and that its primary purpose was not to close the Tennessee River to barge transportation of grain" (J.S. App. 38a). Specifically, the Commission said that it agreed with the decision of Division 2, in this matter, that in view of the "magnitude and the effect of unregulated truck competition" it is "reasonable to conclude that the rates are proposed to meet such competition" (J.S. App. 39a).

The transportation of grain by motor truck is exempt from regulation as to rates by the Commission

because of § 203(b) of the Interstate Commerce Act, particularly § 203(b)(6) of the Act (49 U.S.C. § 303 (b)(6)). The Commission concluded that "regulated carriers should be given considerable leeway in meeting the competition of private and other carriers not subject to Commission regulation, particularly where such competition is clearly dominant" (J.S. App. 27a).

The movement of grain by motor trucks to the Southeastern area is widespread as to origin (J.S. App. 130a), but, in the main, it has its genesis in the Midwest, although a substantial percentage is transported by trucks from the Tennessee River ports to the processors in the Southeastern area. "Considerable grain," according to the Commission's decision, "is processed at the Tennessee River ports but virtually no grain is consumed as such at the ports," and "feed, processed from grain, is not consumed within the port area" (J.S. App. 42a).

The motor trucks which haul grain from the Midwest to the Southeastern region are engaged in a backhaul movement, that is to say, the trucks generally transport agricultural commodities—such as citrus fruits—from the Southeast to the Midwest and, as a backhaul, transport grain to the Southeastern area (see, *e.g.*, Tr. 86–87, 607, 816–819, 832, 895–897, 933, 1175, 1999, 7203, 7411–7414, 12,181–12,185). The Commission found that the "traffic is transported chiefly by private carriers as a backhaul movement, by buy-and-sell operators who commingle merchandising and transportation activities, and by for-hire carriers of

exempt agricultural commodities who haul produce out of the Southeast, principally Florida, and grain as a return load" (J.S. App. 26a).

The transportation of grain by motor trucks from the Tennessee River ports—as contradistinguished from the hauling of grain by motor trucks from the Midwest—to the processors in the Southeastern area does *not* generally involve a backhaul movement (see, *e.g.*, Tr. 6410–6411, 6984, 7010, 12,183–12,185). The grain which is hauled by motor trucks from the Tennessee River ports to the processors in the Southeastern area is *not*, generally, hauled by itinerant operators—in contradistinction to the hauling of grain from the Midwest—but in trucks which are owned by the receivers or river merchants or owned by processors or companies engaged only in hauling or processing grain (see, *e.g.*, Tr. 815–816, 6431, 7565, 10,302).[5]

2. The Southern specified a minimum rate for hauling grain up to 346 miles—which includes, of course, the Tennessee River ports—and the minimum rate was prescribed because of costs incident to the utiliza-

[5] "Specialized equipment is used particularly for the moves to and from the river ports * * *. To describe under these conditions the movement of corn by motor carrier as 'trucking' is perhaps misleading. The larger merchandisers of corn, the elevator operators and the feed mixers include in their staff, personnel who give much of or their exclusive attention to this transportation operation. Fleets are organized, informally perhaps and [illegible] changing, but the service *is* managed [emphasis in original]." *Corn Prices and Freight Rate Developments in the Southeast and Their Meaning for Eastern Agriculture, 1962–63 Season, Progress Report No. 3* (Experiment Station, College of Agriculture, University of Massachusetts), p. 16.

tion of the aluminum cars in short hauls and in order not to "set rates any lower than necessary to participate in the business" (Tr. 1998). With respect to whether the minimum rate for shipments of grain up to 346 miles is invalid as constituting an undue advantage or undue prejudice—within the meaning of § 3(1) of the Interstate Commerce Act (49 U.S.C. § 3(1))—the Commission made the ultimate finding that:

> "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice" (J.S. App. 43a).

The minimum rate for shipments up to 346 miles was said by the Commission to be violative of § 3(1) of the Interstate Commerce Act (49 U.S.C. § 3(1)), which prohibits undue preferences or undue disadvantages (J.S. App. 40a–44a).

The Commission also concluded that the reduced rates are violative of § 1(5) of the Interstate Commerce Act (49 U.S.C. § 1(5)) as unjust and unreasonable (J.S. App. 50a). It was recognized, however, in the Commission's decision that:

> "A substantial rate reduction by the Southern has been shown to be justified for various reasons. First, the proposed reduced rates cover a less complete service and reflect econo-

> mies made possible by the development of the 'Big John' hopper car. Secondly, the huge and rapidly growing volume of grain transported by unregulated motor carriers at low and unpublished rates imperatively required some counteraction by rail management. And finally, that management was entitled to expect from the Commission considerable leeway in meeting its primary and unregulated competition.' * * * At issue here is the lawfulness of a particular level of rail grain rates" (J.S. App. 39a).

In concluding that the proposed rates "are below a minimum reasonable level" (J.S. App. 40a), the Commission said, by way of summary, that it has indicated "its approval of a broad territorial grain rate adjustment at a level approximately 53 percent lower than the preexisting level" (J.S. App. 49a). "An upward revision of the proposed adjustment by 16 percent," according to the Commission, "(1) will preserve for the bargelines the cost advantages they enjoy with respect to certain port-to-port movements; (2) will prevent the transportation of grain by rail at rates which the record indicates would not be adequately compensatory if established on a nondiscriminatory basis from the Tennessee River ports; and (3) will enable the Commission, the carriers, and the other affected interests to determine more clearly, in the light of actual experience, whether a further rail rate reduction is required to meet unregulated truck competition and can be justified costwise, whether such competition can be overcome on a somewhat higher level of rates, and whether the effect on

grain processors and shippers is such as to warrant modification of extension of the reduced rates to meet the needs of the grain trade" (J.S. App. 49a–50a). The proposed rates were "ordered canceled and the proceedings discontinued," but the Commission said that its action is "without prejudice to the filing of new schedules in conformity with the conclusions reached herein" (J.S. App. 50a).

3. The District Court, in reviewing the Commission's decision, concluded that the Commission's findings on the crucial issues are not supported by substantial evidence on the record as a whole (J.S. App. 12a–13a). Specifically, the District Court held that the Commission's finding of substantially similar transportation and competitive conditions, which was the basis for its ruling that the minimum rate constituted an undue preference and unreasonable prejudice in violation of § 3(1) of the Act, is without substantial support in the record as a whole. The purpose of the multiple-car rates, as shown by the record, is to make the railroads "competitive with the dominant long-distance backhaul truck movement of grain from the Middle West to the Southeast" (J.S. App. 10a). The record establishes, according to the District Court, that the motor trucks which haul grain from the Tennessee River ports have no backhaul, and there is, therefore, a necessary difference in rate (J.S. App. 10a–11a). Since the ultimate finding of the Commission lacks adequate evidentiary support, the Court said that it and the conclusion based on it must be set aside (J.S. App. 12a–13a).

The Commission's finding that Southern's rates are unjust and unreasonable under the terms of § 1(5) of the Act was also found by the District Court to be without substantial foundation on the record as a whole (J.S. App. 11a–13a). The Commission's ultimate finding in this respect is also "based on the invalid premise that Section 3(1) of the Act has been violated and on findings as to car utilization and costing procedures which are not supported by substantial evidence in the record" (J.S. App. 13a). The Commission's determination that the proposed rates must be increased in order to avoid unfair and destructive competition is also not supported by substantial evidence in the record (J.S. App. 13a).

An additional basis for the decision of the District Court is the inadequacy of the Commission's findings (J.S. App. 12a–13a). The Commission's ultimate finding with respect to the minimum rate up to 346 miles being an undue preference or an undue advantage is conflictive with findings "by the Commission that transportation conditions, as between the points of origin allegedly unduly preferred and those allegedly unduly prejudiced, are in fact not similar" (J.S. App. 12a–13a). The Commission's conclusion that the Southern's costing procedures improperly duplicated the exclusion of certain maintenance items was not supported by the necessary subsidiary findings (J.S. App. 11a–12a).

The District Court, in view of the foregoing, set aside and enjoined the Commission's order (J.S. App. 13a–14a).

4. The Secretary of Agriculture is filing this memorandum to advise the Court as to the Secretary's position on the issues presented, *viz.*, that the lower court's reversal of the Commission's decision was correct and does not present a substantial question warranting plenary consideration by this Court.

The Commission's findings with respect to the crucial issues were held by the 3-Judge District Court to lack substantial support in the record as a whole. After a lower court has reviewed the adequacy or substantiality of the evidence to determine whether the record as a whole supports findings of fact by an administrative agency, this "Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 491. The District Court, in the case *sub judice*, carefully reviewed the record and applied familiar law in determining that the crucial findings by the administrative agency are not supported by the record as a whole.

It is only when commodities are transported "under substantially similar circumstances" that § 3(1) of the Interstate Commerce Act requires that the rates imposed be the same. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 655. "[D]ifferences in competitive conditions justify," under § 3(1) of the statute, lower rates over one route than over another. *Barringer & Co.* v. *United States*, 319 U.S. 1, 13. "Preference or advantage, on the one hand, and prejudice or disadvantage, on the other hand, are not

unlawful. They must be 'undue or unreasonable' before they violate this provision [*i.e.*, § 3(1) of the Act]." *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F. Supp. 359, 366 (3-Judge Court, N.D. Ill.). The Commission made the finding that, with respect to the minimum rate for shipments of not more than 346 miles, no defense is available to the Southern "by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced" (J.S. App. 43a) and ordered that rates "no less favorable" to the Tennessee River ports than the Ohio and Mississippi River ports be promulgated (J.S. App. 44a). The significant dissimilarities are, however, plainly established by the record.

The hauling of grain by motor trucks from the Midwest is "chiefly by private carriers as a backhaul movement," according to the Commission's findings, "and by for-hire carriers of exempt agricultural commodities who haul produce out of the Southeast, principally Florida, and grain as a return load" (J.S. App. 26a; see also, Tr. 86–87, 607, 816–819, 832, 895–897, 933, 1175, 1999, 7203, 7411–7414, 12,182–12,185). But since no backhaul is available to the motor trucks in the transportation of grain from the Tennessee River ports (see, *e.g.*, Tr. 1999, 6410–6411, 6984, 7010, 12,183–12,185)—as to which the minimum railroad rate is applicable—there is a marked dissimilitude in the competitive conditions.[6] "The record estab-

[6] The "possibility of a backhaul to pick-up a low-cost movement of exempt commodities doesn't reach a serious point until somewhere out to 300 or 350 miles" (Tr. 1999).

lishes," according to the District Court, "that truck movements in relation to those ports are shorter, less than 346 miles, and made without backhaul payloads. Expenses and any profit must therefore be realized from this one-way, one pay-haul and those engaged in it cannot afford to transport commodities for gasoline money as can long-distance backhaul truckers" (J.S. App. 10a–11a).

Southern's minimum rate is not "any lower than necessary to participate in the business" (Tr. 1998). The Commission found that "unregulated trucking is the dominant competitive force," and "we are satisfied that the Southern was motivated primarily by a desire to meet such competition and that its primary purpose was not to close the Tennessee River to barge transportation of grain" (J.S. App. 38a). The Commission also concluded that "regulated carriers should be given considerable leeway in meeting the competition of private and other carriers not subject to Commission regulation, particularly where such competition is clearly dominant" (J.S. App. 27a).

The Commission also found that transportation conditions from the points determined by it respectively to be preferred and prejudiced were in fact substantially different in that, by reason of substantially lower car utilization on short-haul routes, the cost of serving those routes is substantially higher than that for serving long-haul routes (J.S. App. 48a).

The basic finding of the Commission that the minimum rate, for the Tennessee River ports, constitutes an undue prejudice or undue preference was set aside

by the lower court on the ground that the finding is not supported by substantial evidence on the record as a whole, and in the circumstances here we believe the question is so unsubstantial as to require no further consideration.

Although the Commission found that, in general for the transportation of grain, a "substantial rate reduction by the Southern has been shown to be justified for various reasons" and the "huge and rapidly growing volume of grain transported by unregulated motor carriers at low and unpublished rates imperatively required some counteraction by rail management" which is "entitled to expect from the Commission considerable leeway in meeting its primary and unregulated competition" (J.S. App. 39a), nonetheless it was concluded by the Commission that on the basis of the "cost evidence" Southern's rates "are below a minimum reasonable level" (J.S. App. 40a). The rates, said the Commission, should be increased by 16% (J.S. App. 49a–50a). The Commission's finding that Southern's rates are unjust and unreasonable under § 1(5) of the Act was found by the lower court to be lacking in substantial support on the basis of the evidence as a whole (J.S. App. 13a).

The Commission's finding is not only without adequate evidentiary support in the record, but the Commission was led to make the finding—that the rates are, in general, unjust and unreasonable—because it erroneously concluded that the minimum rate, for shipments from the Tennessee River ports, should be invalidated and set aside (J.S. App. 42a). The lower

court's determination that the Commission's finding is without adequate evidentiary support does not, in these circumstances, present a substantial issue so as to warrant further consideration, particularly in view of the Commission's statement that "[d]ifferential pricing should not be inhibited by any obsession about fully distributed costs or by any fear of casting a burden on other traffic where, as here, unregulated transportation is the dominant competitive mode. Continued reliance on carrier management to maximize profits by differential pricing, coupled with reasonable regulatory restraints, will result in more efficient use of transportation resources than either unbridled competition or controls that are excessively mechanistic or idealistic in character" (J.S. App. 36a–37a).[7]

The District Court also concluded that the Commission's findings, conflictive in some respects, are inadequate since the Commission's findings, in the main, are ultimate findings (J.S. App. 12a). The Commission failed to make preliminary or explanatory findings so as to provide an adequate foundation for the ultimate findings. But since the ultimate findings are—as we

[7] The Commission also recognized that under § 15(a)(3) of the Act "a regulated carrier should not be prevented from meeting the major competition of unregulated carriers in order to protect another mode's minor participation [the barge lines] in the traffic. * * * Since 1958, the Commission has frequently found in cases where private or unregulated transportation is the predominant competitive mode, that the indirect and incidental competitive injury inflicted by reduced rates upon regulated modes falls short of being destructive within the meaning of the act" (J.S. App. 38a).

have shown, *supra*, pp. 6–10, 13–14—without substantial evidentiary support on the basis of the record as a whole, we submit that the lower court's holding in that respect is dispositive of the case.

Contrary to the appellants' apparent suggestion, the District Court has not held that the proposed rates are lawful, but only that the Commission's order holding them unlawful is defective and cannot stand. Although we believe that the rates are lawful and have been shown to be lawful, nothing in the lower court's disposition of the case forecloses the Commission, under circumstances which it considers to be appropriate to warrant such action, from reopening the proceeding for the reception of additional evidence, the making of new and adequate findings, and the taking of such action as may be appropriate on the basis of such evidence and findings.

This is not, however, a case in which the administrative order would be sustainable if based on grounds which the record shows were available but were not the actual grounds on which it was based (see, *e.g.*, *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94–95). Nor is this case one in which the decisive findings are so shrouded in doubt that the case should be remanded to the agency for further consideration (see, *e.g.*, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652–655). In view of the grounds on which the District Court disposed of the case, as we have shown, *supra*, pp. 10–11, there is, we submit, no basis for a remand of the proceeding to the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeals present no substantial question and that the judgment of the District Court should be affirmed.

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NOVEMBER 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., APPELLANTS

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

No. 545

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MEMORANDUM FOR THE UNITED STATES

The United States was a statutory defendant in the court below, pursuant to 28 U.S.C. 2322. However, we took the position that the Commission's order cancelling Southern's reduced rates for multiple-car movements of grain in jumbo hopper cars was erroneous. Specifically, we urged that the Commission's ruling that the rates violated Section 3(1) of the

Interstate Commerce Act was based upon inadequate findings as to the competitive conditions at the Tennessee River ports, as compared to the Ohio and Mississippi River crossings, and that the agency order should be reversed and the case remanded to it for further proceedings.

We believe that the district court's reversal of the Commission on this ground was correct and does not present a substantial question warranting plenary consideration by this Court. However, we are of the opinion that the lower court erred in proceeding to make a factual finding which properly should have been the function, in the first instance, of the Commission, and in failing to remand the case for this and other appropriate agency proceedings. These errors, we suggest, do not require plenary hearing and might be appropriately corrected by modification of the judgment below.

1. The Commission's finding that Southern's proposed rates constituted an "undue or unreasonable preference or advantage" in violation of Section 3(1) rested on three essential elements: (1) a difference in transportation charges made as between certain persons, areas or traffic; (2) injury resulting from this difference; and (3) substantial similarity of transportation conditions so that the different charges are not justified. *Atchison T. & S.F. Ry.* v. *United States,* 218 F. Supp. 359, 363 (N.D. Ill.); *New York* v. *United States,* 331 U.S. 284, 305; *United States* v. *Illinois Central R.R. Co.,* 263 U.S. 515, 524. As to the first two factors, the Commission held, and the court below agreed, that the practical effect of the

$2.40 minimum was to impose a higher per-mile charge from the Tennessee River ports as compared to the Ohio and Mississippi River crossings; and that this higher charge would work to the detriment of handlers and merchandisers of grain located on the Tennessee River. On the third element, the Commission found: "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings" (Arrow J. S. App. 43a). The district court reversed the Commission, because of the inadequacy of this finding and the lack of support for it (Arrow J.S. App. 10a–11a, 12a).

We submit that the Commission's order was properly reversed. While the Commission stated that there was "[s]evere truck competition * * * at" both the allegedly preferred and prejudiced points, it is clear that, as the district court correctly found (Arrow J.S. App. 10a–11a), the truck movements "at" those points were quite dissimilar in nature and in competitive impact. The Commission itself described the nature of the truck movement of grain against which Southern's reduced rates from the Ohio and Mississippi River crossings were directed: "The traffic is transported chiefly by private carriers as a backhaul movement, by buy-and-sell operators who commingle merchandising and transportation activities, and by for-hire carriers of exempt agricultural commodities who haul produce out of the South-

east, principally Florida, and grain as a return load" (Arrow J.S. App. 26a). The low, unpublished rates for this long-distance backhaul fluctuated, in some cases being only the cost of gasoline for the return trip (Arrow J.S. App. 39a, 57a). In contrast, the short-haul carriage of grain from the Tennessee River ports was performed as a two-way operation, by truckers in the business of hauling grain to a destination and returning empty for another load. It was relatively more expensive than the long-haul movement and could be met by railroad rates at a higher per-mile level (Arrow J.S. App. 10a–11a).[1] The $2.40 minimum enabled Southern to maintain its competitive position against this short haul at the same time that it competed with the much cheaper long haul.

Before it may properly evaluate whether the $2.40 minimum is justified by these differences in motor carrier competition, the Commission must recognize the existence of these differences. The failure to do so plainly required reversal. For it was on the basis of its erroneous finding on the similarity of competition that the Commission found undue preference in violation of Section 3(1) (Arrow J. S. App. 40a–44a). And, in turn, the erroneous finding of a Section 3(1) violation was an essential foundation of the Commission's ultimate conclusion that the rates were

[1] This is demonstrated by evidence which indicated average movements of 150 miles from the Tennessee River ports at a charge of $3.00 per ton (Exs. 279, 302, 509; Tr. 12,170, 12,171). The backhaul truck movement of grain into the southeast, Southern found, became a significant factor only at distances of more than 300–350 miles (Tr. 1998–2003; see Tr. 816, 895–896, 933).

unreasonably low. The Commission reasoned that elimination of the discriminatory minimum would lessen the efficient utilization of the jumbo cars (by increasing the proportion of short hauls), thus resulting in upward revision of costs; and it concluded that, in order to make the multiple car rates reasonably compensatory, an increase of 16 percent in the rates to all points would be necessary (Arrow J. S. App. 48a–50a).

To be sure, the Commission also cited two other factors as adversely affecting utilization of the new cars—(a) the competition afforded by competing rail carriers to the southeast, which were to be allowed the same reduced rates in conventional equipment; and (b) a correction in certain items of maintenance expense (Arrow J.S. App. 48–49a). But these various factors were cumulative, not alternative, in the Commission's reasoning (indeed, the Section 3(1) holding appears the most significant). As long as one crucial element of the Commission's report has to be overturned, the order of the Commission cannot stand. Cf. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653, 654; *North Carolina* v. *United States*, 325 U.S. 507, 520.[2]

[2] We note that the district court also held that the Commission's reliance upon the factors other than the Section 3(1) violation was erroneous, first, because Southern's estimate of car utilization had already assumed the competition of other roads; and, second, because the ruling on maintenance expenses was not supported by requisite findings (Arrow J.S. App. 12a).

In this memorandum, we take no position on the correctness of the district court's judgment on these points which are much less clear than the Section 3(1) issue, and which in any event appear to have relatively less significant impact upon the rea-

2. Appellants seek to sustain the Commission's finding by explaining that the competition which the Commission found to be similar "at the Tennessee River ports as well as at the Ohio and Mississippi River crossings" (Arrow J.S. App. 43a) was that of long-haul trucking into the southeast from country elevators far beyond the river crossings. The identical motor carrier movement, it is said, satisfies a demand which might otherwise be met by rail from the Ohio and Mississippi crossings or barge-rail traffic through the Tennessee and therefore provides identical competitive conditions for those routes (Arrow J.S. 11–13; I.C.C. J.S. 16).

This defense of the Commission, however, does not accord with the agency's own opinion. The Commission's statement that "[s]evere truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings" (Arrow J.S. App. 43a) plainly refers to competition "*at*" those points, *i.e.*, motor carriers offering alternatives for shippers located there, as distinguished from carriers traversing a route touching neither point.[3] Moreover, the

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sonableness of the reduced rates. Since remand is required because of the Section 3(1) issue, the Commission will have an opportunity to reconsider its position on these factors.

[3] Indeed, the Commission's main argument in the court below, contrary to its position here, was that trucking was a factor in moving grain *out* of the Tennessee River ports. Brief for I.C.C., pp. 38–41, 45–46 and Appendix C thereto, pp. 17a–40a; see also Reply Brief for Intervening Defendants, p. 18 and Appendix A thereto, pp. 1–4. Intervening defendants stressed the alternative argument presented in the jurisdictional statements. See Reply Brief for Intervening Defendants, pp. 15–18; see also Brief for I.C.C., pp. 46–48.

Commission went on to say, "It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice." (Arrow J.S. App. 43a.) In speaking of picking and choosing competition, the Commission evidently was describing the competition afforded by the different truck movements which originate at the preferred points on the one hand and at the prejudiced points on the other. We know of no Commission precedents which indicate that similarity of competitive conditions between prejudiced and preferred points might be shown by reference to competition afforded both points by yet a third route. Introduction of such a novel principle must be supported by reasoning and discussion in the Commission's report, not present here. "The courts may not accept appellate counsels' *post hoc* rationalizations for agency action," *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168.

In any event, petitioners' argument itself demonstrates the inadequacy of the Commission finding on the similarity of competitive conditions. For it represents an alternative (and less plausible) rendering of the Commission's finding, in addition to the one previously discussed, and establishes an inherent ambiguity. See *United States* v. *Chicago, M. & St. P. & P.R. Co.*, 294 U.S. 499, 511.

3. In our view, the district court's reversal of the Commission on the ground described above—the inadequacy of its findings on competitive conditions—does not present a substantial question requiring a plenary hearing in this Court. The court below cor-

rectly applied the standards governing judicial review of the agency order, and the Commission's error is clear.

The district court, however, went beyond this ruling in two respects: (a) it apparently made an independent review of the evidence and held that a Section 3(1) violation could not be found on the present record; and (b) it "permanently suspended, annulled and enjoined" the Commission's order (Arrow J.S. App. 13a–14a), without remanding for further proceedings. We believe that substantial questions are presented by these aspects of the district court decision, although, as indicated below, it may be appropriate to resolve the matter by an order entered on the jurisdictional papers, without plenary hearing.

(*a*) After holding the Commission's findings inadequate to support a Section 3(1) violation, the district court went on to conclude that "transportation conditions, as between the points of origin allegedly unduly preferred and those allegedly unduly prejudiced are *in fact* not similar" (Arrow J.S. App. 12a–13a; emphasis added). In the light of the court's earlier stress upon its own "diligent and painstaking search of the massive record" in support of its conclusions (Arrow J.S. App. 4a), the district court was apparently expressing its independent judgment that on no theory could a Section 3(1) violation be found upon the present record.

Such a holding goes beyond the proper scope of judicial supervision of administrative agencies. The "function of the reviewing court ends when an error of law is laid bare. At that point the matter once

more goes to the Commission for reconsideration.' *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 20. And upon such reconsideration, the agency must again exercise its special functions. An "administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145. It is improper for a reviewing court to make factual findings or policy determinations in the first instance, for to do so would "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88.[4]

In the present case, accordingly, it is for the Commission to appraise the appellants' new theory that competition is afforded all intermediate points by the same long-haul trucking (*supra*, pp. 6–7); to decide whether the differences in competitive conditions "at" the various points is sufficient to justify the

[4] See, also, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20.

precise level of the minimum here;[5] and to determine whether additional evidence should be taken.[6]

(*b*) Related to the court's error in entering into essentially administrative questions is its failure to remand the case to the Commission for further proceedings. A reviewing court's decision is binding on the agency only with respect to those issues actually decided on review.[7] After reversal, therefore, the agency is free to make new findings on a new record (*Federal Trade Commission* v. *Ruladam*, 316 U.S. 149, 150–151), or, if the court held only that findings were inadequate, to make new findings on the same record (*United States* v. *U. S. Smelting Co.*, 339 U.S. 186, 189, 198–199). An explicit remand is not required to give the agency such power, which flows from the

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[5] It is well settled that, in determining a Section 3(1) violation, any difference in competitive conditions is a factor to be considered in the first instance by the Commission along with "all the relevant facts and circumstances" (*Barringer & Co.* v. *United States*, 319 U.S. 1, 6–8; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 592; *United States* v. *Illinois Central Co.*, 263 U.S. 515, 525; *Atchison T. & S.F. Ry.* v. *United States*, 218 F. Supp. 359, 374–375 (N.D. Ill.)).

[6] Further Commission consideration may also be required on the other two factors which the Commission held affected car utilization, the use of the reduced rates by other railroads, and the treatment of car maintenance expenses, see fn. 2, *supra*. On the latter point, the district court held only that the Commission erred in failing to support its conclusion with requisite findings. The court did not find that the record compelled the contrary conclusion as a matter of law, or that the factor was insignificant, as Southern asserts (see Southern Motion to Affirm, p. 21, fn. 14).

[7] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 140–141, 145; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U.S. 156, 160.

limited scope of judicial supervision and from the agency's authority over its own proceedings.[8]

The prevailing and almost uniform practice of reviewing courts, however, is to remand the case, after reversal, for further agency proceedings.[9] We believe that this practice is eminently desirable for two reasons. *First,* it makes clear that the court is not intruding on the agency's functions but, rather, is limiting itself to the correction of legal error. On remand, as this Court has said, "[t]he whole proceeding thereafter [is] *in fieri*", and, at the conclusion of subsequent agency proceedings, "[w]hen finally decided, all questions [are] still open and could be presented", *United States* v. *U.S. Smelting Co., supra,* at 186, 198–199. See, also, *Cantlay & Tanzola* v. *United States,* 115 F. Supp. 72, 82 (S.D. Cal.). *Second,* a remand removes any doubt about the agency's power to reopen the prior record, and forecloses any contention that an entirely new hearing is required. *Federal Trade Commission* v. *Carter Products, Inc.,* 346

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[8] For such I.C.C. action after reversal without remand, see *Florida* v. *United States,* 282 U.S. 194, 215; *Erie R. Co.* v. *United States,* 64 F. Supp. 162 (S.D. Ohio). See, also, *Thompson* v. *United States,* 20 F. Supp. 827 (E.D. Mo.).

[9] *E.g., National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U.S. 219; *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364; *Helvering* v. *Rankin,* 295 U.S. 123. See, *Anglo Canadian Shipping Co.* v. *United States,* 264 F. 2d 405, 414–415 (C.A. 9). Examples of remands to the Interstate Commerce Commission after the Court held findings to be inadequate are *American Trucking Assns.* v. *United States,* 364 U.S. 1, 15–16; *Secretary of Agriculture* v. *United States,* 347 U.S. 645.

U.S. 327.[10] In contrast, the entry of a final injunction without remand carries at least some implication that the agency has lost its freedom to proceed upon the existing record. Moreover, while appellee Southern Railway suggests (Southern Motion to Affirm, pp. 25–26) that the Commission may be able to reopen the present proceedings without an order remanding the case, this is not so clear as to foreclose the possibility of litigation on the point.

If, as we urge in points 1 and 2 above, the Court does not consider the merits raised by the jurisdictional statements to warrant plenary consideration, we suggest that the modification of the lower court's order might be accomplished by summary order, without further briefing and argument—the course followed in *Federal Trade Commission* v. *Carter Products, Inc.*, 346 U.S. 327 (fn. 10, *supra*).

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[10] In *Carter*, this Court summarily vacated a judgment setting aside an FTC order, and directed the Court of Appeals to reinstate its judgment after amending it specifically to authorize the Commission to open the proceeding for further evidence and a new order consistent with the Court of Appeals' opinion. The court of appeals had held that the hearing examiner's restriction on Carter's cross-examination of government witnesses denied it a fair hearing and had directed that the Commission order be "set aside" (201 F. 2d 446, 454 (C.A. 9)). The government's petition to this Court argued that the case should have been remanded to permit correction of the error in further proceedings, and it assumed that the court of appeals' order would have required "destruction of a proceeding of some ten years' duration" and an entirely new start (Petition for a Writ of Certiorari in No. 114, O.T. 1953, pp. 14, 19). While a reversal on due process grounds might indeed appear to nullify the entire hearing, a reversal because of inadequate findings—as in this case—would not have that effect. As indicated in the text, however, we believe an explicit remand is to be preferred in all cases to remove any doubt on this point.

CONCLUSION

For the foregoing reasons, we submit that the judgment below should be modified so as (a) to limit the grounds of reversal of the Commission to a holding that the findings were inadequate to sustain the conclusion that Section 3(1) was violated, and hence that the proposed rates were unlawful, and (b) to authorize the Commission to take such further steps as it may deem necessary consistent with the district court's opinion. As so modified, the judgment should be affirmed.

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NOVEMBER 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

No. 545

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the Southern District of Ohio.

REPLY TO MOTIONS TO AFFIRM AND MEMORANDA

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December 1964

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INTERSTATE COMMERCE COMMISSION, *Appellant*,

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THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the Southern District of Ohio

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REPLY TO MOTIONS TO AFFIRM AND MEMORANDA

Drastically different positions are taken in the Motions to Affirm filed by the Southern Railway system (herein referred to as "Southern"), the Southern Governors' Conference, et al., and the City of Cincinnati, and in the Memorandum filed by the Solicitor

General. The Memorandum filed in behalf of the Secretary of Agriculture supports Southern's position.

Southern seeks to defend the judgment of the court below. The Solicitor General concedes that the court's judgment is indefensible and suggests summary reversal because of holdings which go beyond the proper scope of judicial review, but asks that the Court also find that the Commission's finding as to competition is inadequate and direct that the cause be remanded to the Commission for further proceedings. The Southern's Motion and the Solicitor General's Memorandum will be discussed herein in that order. The Secretary of Agriculture's Memorandum and the other motions to affirm make no additional points and require no reply.

I.

SOUTHERN'S MOTION TO AFFIRM

Southern's Motion to Affirm rests on basic errors of law and fact. It would obscure the important issues which should be resolved by this Court.

(1) The Section 3(1) Issue

The section 3(1) issue is "narrow and conventional", as contended by Southern, *only* if the law governing the scope of the Commission's discretion is changed, the Commission's cost findings are rewritten, and findings and evidence of competition faced by the Southern at Ohio and Mississippi River ports and at the Tennessee River ports are distorted.

Southern's major premise is that the Interstate Commerce Commission cannot find undue prejudice and preference in any situation where there is any difference in transportation conditions or competitive cir-

cumstances as between the preferred and prejudiced points. (M., pp. 13-14)[1] In support of its contention, Southern relies primarily on an 1892 decision, *Interstate Commerce Comm'n* v. *Baltimore & O. R.R.*, 145 U.S. 263, 284. More recent decisions are directly to the contrary. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 588-594; *Barringer & Co.* v. *United States*, 319 U.S. 1, 6-7; *United States* v. *Wabash R.R.*, 321 U.S. 403, 410-11; *New York* v. *United States*, 331 U.S. 284; *United States* v. *Illinois Central R.R.*, 263 U.S. 515.[2]

There are differences in transportation conditions and competitive circumstances in virtually every section 3(1) case. It is the Commission's function to weigh

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[1] Citations to "M" are to the Motion to Affirm filed by Southern. Citations to "Com. J.S." are to the Jurisdictional Statement filed by the Interstate Commerce Commission. Citations to "Arrow J.S." are to the Jurisdictional Statement filed by Arrow Transportation Company, et al. Citations to "S.G." are to Memorandum filed by the Solicitor General.

[2] Southern itself cites *United States* v. *Illinois Cent. R.R.*, *supra*, and *New York* v. *United States*, *supra*, but holdings in these cases refute its position.

In *Illinois Central*, the Court held that a finding of unlawful preference and prejudice is not precluded "by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic" (p. 525).

In *New York*, the Court held:

"The choice of groupings is plainly a specialized problem in transportation economics upon which the Commission is peculiarly competent to pass. Its judgment that the difference in consists between the territories do not justify the present differences in interterritoral class rates is, indeed, an expert judgment entitled to great weight. We could not disturb its findings on the facts of this record without invading the province reserved for the expert administrative body" (p. 326).

these factors in the light of the public interest and determine whether they are of sufficient magnitude to justify the discrimination. Here grain merchants at the Tennessee River ports have the same type of facilities as merchants at Ohio and Mississippi River points. Grain is loaded from elevators into the same type of cars for movement to the same destinations, covering part of the journey over the same tracks. There are minor transportation differences between movements from Chattanooga and Evansville; there are similar differences between movements from Evansville and St. Louis. These differences can only be a matter of degree. Acceptance of Southern's proposition that any difference in costs precludes the Commission from requiring equality of treatment would necessarily prevent the Commission from prescribing rates by origin or destination groupings without regard for strict cost considerations, and would require overruling *Ayrshire Collieries Corp.* v. *United States, supra.* It would reduce the role of the Commission to that of a computer with no opportunity to exercise an informed judgment.

Southern's minor premise is that the Commission made findings as to differences in transportation conditions at the prejudiced points on the Tennessee River and the preferred points on the Ohio and Mississippi Rivers which preclude a finding of unlawful preference and prejudice. (M., p. 13). It says that the "most notable" such finding was that the effect of non-discriminatory rates from the Tennessee River ports "would be *drastically* to decrease the average annual utilization of Southern's Big John cars." [emphasis supplied] This is not the finding which the

Commission made. The Commission's finding was that:

> We agree with the Southern that the "Big John" car utilization would be reduced to the extent that such cars were used to haul grain from the Tennessee River ports. We do not agree, however, that a virtual embargo may be imposed on traffic moving from the Tennessee River ports to major markets in order to justify costwise the rates established from the Mississippi and Ohio River crossings. (Arrow J.S., p. 42a)

There is a striking parallel between the Commission's finding here and this Court's holding in *Ayrshire Collieries Corp.* v. *United States, supra*:

> Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or in distance. That is not enough provided the Commission was justified in considering the element of competition.
>
> We think it was. (p. 592)

Furthermore, as the Commission recognized (Arrow J.S., p. 43a), the section 3(1) issue in this case arises in the context of intermodal competition between all-rail movements from the Ohio and Mississippi crossings and barge-rail movements via the Tennessee River ports. In such a situation, even assuming acceptance of Southern's contention that cost differences require the Commission to approve rate differences, the rate differences applicable to the ex-barge traffic would have to be related to proved differences in cost (*Interstate*

Commerce Comm'n v. *Mechling*, 330 U.S. 567, 581).[3] Here the only element of relative cost (and of necessity the only element discussed by the Commission) was the effect of car utilization. And even on this narrow point, such evidence consisted only of general opinion testimony that car utilization from the Tennessee River ports would be less. It offered no basis for measuring any cost differences which might result. A determination as to relative costs from the Tennessee River ports and from the Ohio and Mississippi River crossings would require a detailed study covering not only this factor but many others. Southern presented no such study.[4]

Southern also attacks as not supported by substantial evidence the Commission's finding that there is not sufficient dissimilarity in transportation conditions to justify the discrimination against the prejudiced points because "Severe truck competition exists at the Tennessee River ports as well as at the

[3] Southern states that its rates were "meticulously designed" to meet long-haul truck competition. (M., p. 9) In fact:

(a) Southern's reply to the petition for suspension stated that the competition the rates were designed to meet was primarily water transportation (Arrow J.S., p. 115a). The contention that unregulated trucks represent the major competition was developed *after* the rates had been designed.

(b) Southern's vice president King, in charge of Southern's Traffic Department, testified that he did not know how low he had to go in order to get the business, and did not know whether the rates were lower than necessary to meet the competition (Tr. 291). The Commission found that Southern failed to show "that a lesser reduction would not accomplish its declared purpose" (Arrow J.S., p. 39a).

[4] The burden of proving cost differences was on Southern, as the proponent of the changed rates. (49 U.S.C. § 15(7)).

Ohio and Mississippi River crossings" (M., pp. 14-15). This subject is adequately covered in the jurisdictional statements. (Com. J.S., pp. 12-18; Arrow J.S., pp. 9-15).[5]

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[5] Footnote 11, at page 17 of Southern's Motion, does present three new contentions:

1. That appellants have changed their position. This is not correct. The same positions were taken in the Court below.

2. That the long-haul truck competition experienced at both the Ohio and Mississippi River crossings and the Tennessee River ports is not transportation competition but "rather competition in the satisfaction of consumer demand, unrelated to the method of transportation involved", citing an 1896 decision having something less than clear relevance to the point involved. The competition from the long-haul trucker is *transportation* competition to Southern at both the Ohio and Mississippi River crossings and at the Tennessee River ports. As the Interstate Commerce Commission recognized more than 50 years ago: "Strictly speaking, there is no such thing as market competition which is distinct from competition between the lines of transportation serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads." *City of Spokane* v. *Northern Pacific Ry.*, 21 I.C.C. 409, 414 (1911), *aff'd*, *United States* v. *Atchison, Topeka & Santa Fe Ry.*, 234 U.S. 476 (1914).

3. That the Commission's finding is "inconsistent with the testimony . . . of the barge lines serving the Tennessee River points that they had never felt the impact of any long back-haul truck competition." This is a classic among non-sequiturs. The extent of long back-haul truck competition into the Southeast was hotly disputed before the Commission. Southern persuaded the Commission that it was of large proportions, and on that basis the Commission applied an out-of-pocket rather than a fully distributed cost to determine that the all-rail routes rather than the barge-rail routes were the low-cost mode. Southern, having prevailed on this point, now seeks to disavow its own evidence in favor of that offered by the barge lines to escape those consequences of the Commission's acceptance of its portrayal of the competitive situation which it happens not to like.

In essence, Southern's argument is that it is entitled to elect to meet at the Ohio and Mississippi River crossings the long-haul truck competition of which it complains, while refusing to meet at the Tennessee River ports either that same long-haul competition or the additional short-haul competition, even though the result of such refusal is to put grain merchants at the Tennessee River ports out of business. If this position is accepted, railroads will be given the power of life and death over businesses which afford them shorter hauls than competing businesses elsewhere on their lines. Certainly so fateful a proposition is deserving of consideration by this Court prior to its formal promulgation.

Finally, it should be noted that Southern's Motion misconstrues the Commission's opinion and order. The Commission did not rule, as Southern states, "that any disparity of per mile rate treatment by Southern as between short and long hauls would be unduly prejudicial and preferential" (M., pp. 12-13).[6] What the Commission held was that "The respondents may employ any means of correction they choose, provided that rail rates from the Tennessee River ports are no less favorable to shippers located thereat than the all-

[6] Southern's assumption that elimination of the 240 cent minimum would produce equality "per mile" is erroneous. The rates in issue are computed on a formula which includes both a terminal and a ton-mile factor. Because the terminal factor is spread over all the miles traveled, the per mile rate on a shorter haul is always higher than on a longer one. For example, a haul of 400 miles produces a rate of 271 cents per ton [42 + (400 × .573)], or .68 cents per ton mile (61 cents per 90-ton car mile). By contrast, a haul of only 100 miles produces a rate of 99 cents per ton [42 + (100 × .573)], or .99 cents per ton mile (89 cents per 90-ton car mile). Thus, the shorter haul, with the minimum rate eliminated, would produce ton-mile or car-mile earnings approximately 45 per cent greater than would the longer haul.

rail rates available to shippers at the Ohio and Mississippi River crossings who compete in common markets in the Southeast" (Arrow J.S., p. 44a).

(2) The Section 1(5) Issue

The section 1(5) issue is "narrow and conventional", as contended by Southern, only if this Court is prepared to accept the District Court's determination of the weight to be given Southern's cost evidence, and thus permit the courts to invade what heretofore has been regarded as the province of the administrative body. *Illinois Commerce Comm'n* v. *United States*, 292 U.S. 474, 481.

Southern sought to carry its burden of proof as to reasonableness of the rates by showing its average costs. An essential part of showing its costs was establishing a reliable figure for car utilization. Southern used a figure of 40,000 miles per year, far in excess of any established figure. Division 2 while rejecting some of Southern's costing factors, accepted the 40,000 mile figure on the basis of operating and engineering judgments, but pointed out that "no significant or dependable experience has been gained either as to future car utilization or the car expenses that might be associated with such utilization" (Arrow J.S., p. 137a).

The entire Commission accepted the finding that there was no reliable data in the record as to car utilization but did not accept the operating and engineering judgments. It also pointed out that the car utilization figure used by Division 2 should be reduced because the curing of the section 3(1) discrimination and the approval of the rates of the other railroads would each result in reduced car utilization. A determination as to the reliability of the data submitted by Southern is certainly a matter peculiarly

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within the competence of the Commission, and a finding by the Commission that the 40,000 mile figure had not been justified, with the result that a proper return had not been established, was all that was required to sustain the Commission's order cancelling the proposed rates.

It was in this context that the District Court accepted Southern's argument and found, as a fact, that "Southern entered an exhibit which indicated that their actual experience with the use of 'Big John' cars under multiple car rates had been a utilization figure of 60,212" (Arrow J.S., p. 11a). "Actual experience" did not, in fact, so indicate (Arrow J.S., p. 17),[7] and Division 2, which was prepared to accept Southern's general opinion testimony, expressly found that there was no "dependable experience". (*supra*, p. 9)

One could hardly find a better example of error which can come about when a court "goes beyond the proper scope of judicial supervision of administrative agencies" (S.G., p. 8).

(3) The Section 15a(3) Issue

Southern makes no real effort to defend the District Court's ruling on the section 15a(3) issue, but suggests that if the remainder of the District Court's ruling is correct, the section 15a(3) issue is academic (M., p. 23).

If the District Court's ruling on this issue is incorrect, as we think is clearly the case, to permit it to remain in the books backed by the imprimatur of an

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[7] In its Motion, Southern points to the importance of "turn-around time" in utilization of equipment. (M., p. 13, fn. 8) Yet it was the "turn-around time" at origin that Southern had failed to measure in its "experience" study. (Arrow J.S., p. 17)

affirmance of the District Court's decision by this Court could give rise only to misunderstanding and additional unnecessary litigation. But it cannot be academic since the Commission expressly found (Arrow J.S., pp. 39a-40a) that on certain port-to-port movements the barge routes have the inherent advantage of lower cost even on an out-of-pocket cost basis. The Commission found it unnecessary to deal with this problem because rail rates at the level it was willing to approve were higher than the corresponding barge rates. Southern's rates, as approved by the District Court, raise the problem directly because they undercut the barge rates on movements where the barge lines, without question, have the inherent cost advantage.

II.

MEMORANDUM OF THE SOLICITOR GENERAL

(1) The Section 3(1) Issue

The Memorandum of the Solicitor General attacks as erroneous the Commission's finding that:

> "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings."

In attacking this subsidiary finding, the Memorandum displays an unawareness of facts that are undisputed. It states (S.G., p. 6) that the Commission, in speaking of severe truck competition which exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings, "plainly refers to competition '*at*' those points, i.e., motor carriers offering

alternatives for shippers located there, as distinguished from carriers traversing a route touching neither point." In the second sentence immediately following, the Memorandum further states that in speaking of the inability of the carrier to pick and choose the competition it will meet, "the Commission was describing that competition afforded by the different truck movements *which originate at the preferred points on the one hand and at the prejudiced points on the other*". (emphasis supplied)

The Memorandum thus labors under the apparent misapprehension that there are substantial long-haul truck movements of grain which *originate at* the Ohio and the Mississippi River crossings. This is not the case. Southern itself represented, and it is undisputed, that the long-distance unregulated backhaul truck movements to the Southeast originate at country elevators north and west of the Ohio and Mississippi River crossings. Such movements do not originate at the crossings themselves. These truck movements, originating back of the crossings, proceed through or around both the Ohio and the Mississippi River crossings and the Tennessee River ports, furnishing competition for merchants at both sets of locations. There is additional truck competition—some of it backhaul—*from* the Tennessee River ports.

The arguments set forth in the Memorandum are thus predicated upon assumptions as to the transportation situation which simply do not fit the facts.

(2) The Section 1(5) Issue

The Solicitor General's Memorandum ignores the District Court's invasion of areas assigned by the

Congress to the Commission with respect to the section 1(5) issue. There, as in the case of the section 3(1) issue, the District Court also made findings of fact as noted, *supra*, p. . This erroneous invasion of the province of the Commission led the District Court to make erroneous factual statements, and raises substantial questions requiring plenary consideration.[8]

(3) The Section 15a(3) Issue

The Solicitor General's Memorandum fails to comment on the substantial questions raised by the District Court's disposition of the section 15a(3) issue.[9]

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[8] In its discussion of the section 1(5) issue the Memorandum states that the Commission "cited two other factors as adversely affecting utilization of the new cars" (S.G., p. 5). In fact, as the District Court noted, the Commission cited three other factors. Furthermore, we do not understand what is meant by the statement in the Memorandum that the three factors were cumulative. Certainly the factor which the Memorandum fails to mention, "That there was no reliable evidence of record to support the claimed utilization figure of 40,000 * * *" (Arrow J.S., p. 11a) is sufficient standing alone to support the Commission's order.

[9] Another point which the Solicitor General's Memorandum ignores is that the rates in issue are in effect over the other railroad systems serving the Southeast in addition to Southern. Division 2 found that the rates over these other roads could not be justified and would have authorized the existing rates for Southern alone. The entire Commission held that, in fairness to shippers, rates over all the roads must be the same and could be on the somewhat higher level it was willing to approve. Thus, Division 2 and the entire Commission were in agreement that the existing rates could not possibly be justified for the railroads other than Southern, and the District Court made no attempt to justify them. These other roads have not even joined with Southern in seeking affirmance of the judgment below. Yet the Solicitor General suggests that the matter be reopened for probably lengthy proceedings before the Commission with rates meanwhile left in effect which, for the other railroads involved, have no possible basis for justification.

* * *

Appellants concur in the conclusion of the Solicitor General that the District Court erred, and that "substantial questions are presented" (S.G., p. 8), but submit that his proposed disposition of those substantial questions by summary reversal in part is no solution. The questions presented in this case are much too important and complex to be disposed of without plenary consideration.

Respectfully submitted,

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